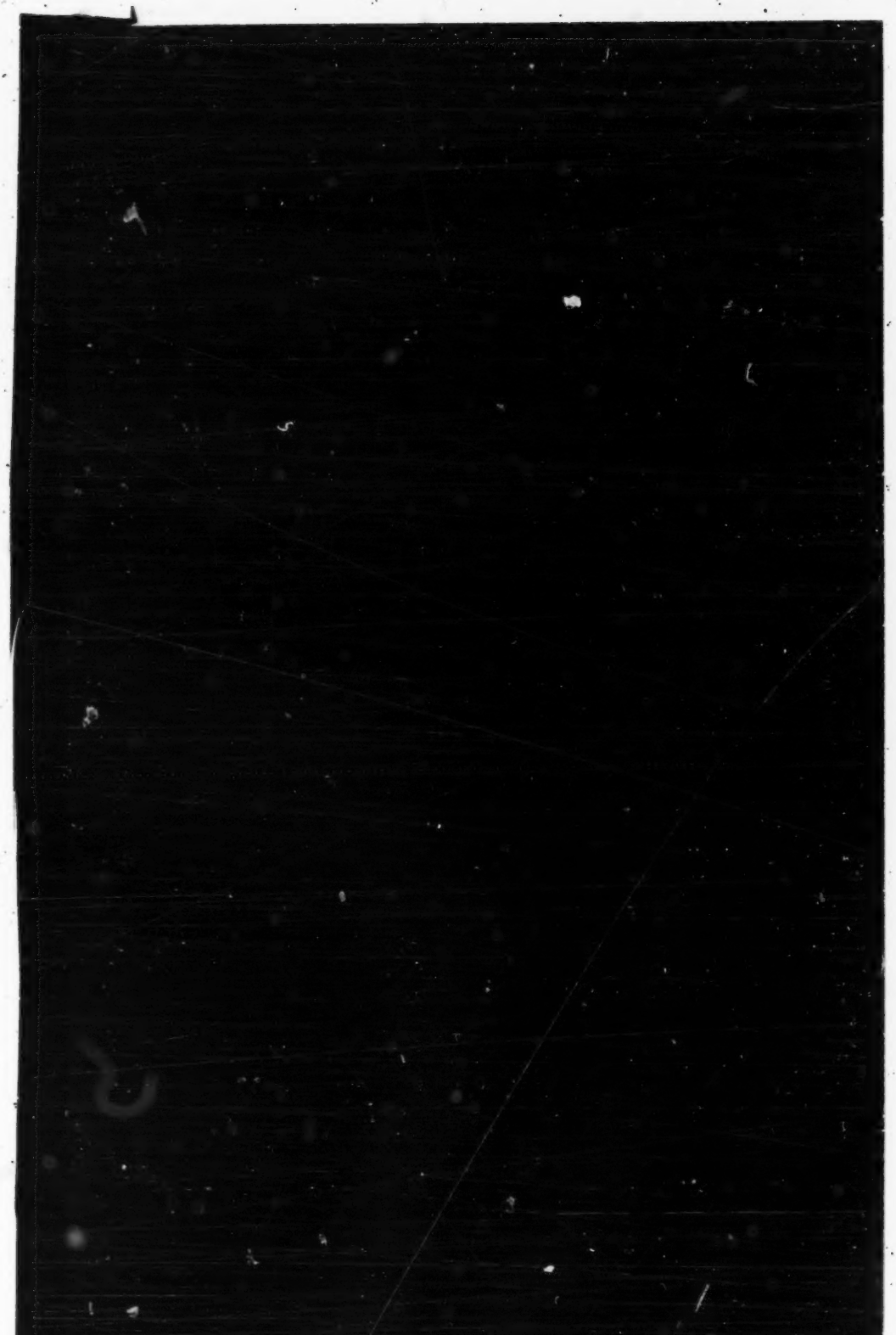

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	6
Argument:	
Introduction	11
I. Appellees' fire insurance business is subject to the federal commerce power	13
The pertinent facts	13
A. The insurance business is in interstate commerce	17
B. The insurance cases are not controlling	22
C. The insurance cases are inconsistent with other decisions of this Court	35
D. The meaning of "commerce" when the Constitution was adopted	42
1. General usage in the Eighteenth Century	42
2. Usage by members of the Constitutional Convention	45
E. The present meaning of commerce	48
1. The usage in the business and legal worlds generally	50
2. The usage of this Court	58
F. Fire insurance falls within the federal commerce power because of its effect upon interstate industries	60
G. The insurance industry should be subject to federal regulatory power	67
II. The insurance business is subject to the Sherman Act	69
A. The language of the Act	70
B. The words "trade or commerce", as used in the Sherman Act, were not intended to have a narrower meaning than in the Constitution	71
C. The history of the Sherman Act since 1890 does not justify a restrictive interpretation exempting the insurance industry	82

Argument—Continued.
Introduction—Continued.
II. The insurance business, etc.—Continued.
D. The argument that an exemption for insurance companies should be read into the Sherman Act because of the peculiarities of the insurance business is without merit ..... Page 99
E. The effect of a decision that insurance is commerce and subject to the Sherman Act upon state legislation 122
Conclusion 133
Appendix 134

CITATIONS

Cases:

Adair v. *United States*, 208 U. S. 161 35
Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211 ..... 72, 81
Aetna Insurance Co. v. *Commonwealth*, 106 Ky. 864, 51 S. W. 624 106
American Medical Association v. *United States*, 317 U. S. 519 ..... 8, 9, 37, 39, 70, 98
Anderson v. *United States*, 171 U. S. 604 29
Apex Hosiery Co. v. *Leader*, 310 U. S. 469 ..... 67, 72, 73, 77, 92
Appalachian Coals, Inc., v. *United States*, 288 U. S. 344 76
Associated Press v. *National Labor Relations Board*, 301 U. S. 103 18
Atlanta Association of Fire Insurance Agents v. *McDonald*, 181 Ga. 105 131
Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427 ..... 40, 49, 72
American Column Co. v. *United States*, 257 U. S. 377 113
Bacon v. *Illinois*, 227 U. S. 504 30
Bank of Augusta v. *Earle*, 13 Pet. 519 23
Barden v. *Northern Pacific R. Co.*, 154 U. S. 288 79
Bedford Cut Stone Co. v. *Stone Cutters' Assn.*, 274 U. S. 37 82
Beechley v. *Mulville*, 102 Iowa 602, 70 N. W. 107 106
Binderup v. *Pathe Exchange*, 263 U. S. 291 30
Booker & Kinnaird v. *Louisville Board of Fire Underwriters*, 188 Ky. 771, 224 S. W. 451 106
Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274 28
Bowman v. *Chicago & N. W. Railway Co.*, 125 U. S. 465 ..... 26, 48
Brock v. *Hardie*, 114 Fla. 670, 154 So. 690 ..... 107, 131
Burnet v. *Coronado Oil Co.*, 285 U. S. 393 79
Caldwell v. *North Carolina*, 187 U. S. 622 26
California v. *Thompson*, 313 U. S. 109 124
Caminetti v. *United States*, 242 U. S. 470 17
Carroll v. *Greenwich Insurance Co.*, 199 U. S. 401 60
Carter v. *Carter Coal Co.*, 298 U. S. 238 ..... 35, 98
Champion v. *Ames*, 188 U. S. 321 ..... 8, 18, 37, 69, 88

Cases—Continued.

	Page
Chicago & N. W. R. Co. v. *Fuller*, 17 Wall. 560	126
Chicago Board of Trade v. *Olsen*, 262 U. S. 1	20, 66, 72
Coe v. *Errol*, 116 U. S. 517	26, 81
Continental Insurance Co. v. *Board of Fire Underwriters of the Pacific*, 67 Fed. 310	106
Cooley v. *Board of Port Wardens*, 12 How. 299	26
Coronado Coal Co. v. *United Mine Workers*, 268 U. S. 295	67, 72, 82
Covington & c Bridge Co. v. *Kentucky*, 154 U. S. 204	18
The Daniel Ball, 10 Wall. 557	69
DeLancey v. *Insurance Co.*, 52 N. H. 581	22
Ducat v. *Chicago*, 10 Wall. 410	28
Duckworth v. *Arkansas*, 314 U. S. 390	124
Eisner v. *Macomber*, 252 U. S. 189	97
Electric Bond & Share Co. v. *Securities and Exchange Commission*, 303 U. S. 419	18, 19, 40, 41
Employers' Liability Cases, 207 U. S. 463	29, 69
Federal Trade Comission v. *Bunte Bros.*, 312 U. S. 349	90
Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U. S. 52	18
Firemen's Fund Insurance Co. v. *Hellner*, 159 Ala. 447, 49 So. 297 (1909)	106
Fire Insurance Cos. v. *State*, 75 Miss. 24, 22 So. 99	106
Frost and Co. v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38	41
German Alliance Ins. Co. v. *Hale*, 219 U. S. 307	58, 107
German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389	9, 41, 58, 61
Gibbons v. *Ogden*, 9 Wheat. 1	8, 35, 37, 44, 48, 49, 69
Gladson v. *Minnesota*, 166 U. S. 427	27
Gooch v. *United States*, 297 U. S. 124	17
Grand Jury, In re, 62 Fed. 840	49
Hammer v. *Dagenhart*, 247 U. S. 251	35, 98
Harris v. *Commonwealth*, 113 Va. 746, 73 S. E. 561	106
Hartford F. Insurance Co. v. *Raymond*, 70 Mich. 485, 38 N. W. 474	106
Hartford F. Insurance Co. v. *State*, 76 Ark. 303, 89 S. W. 42	106
Heisler v. *Thomas Colliery Co.*, 260 U. S. 245	29, 35
Helvering v. *Grieths*, 318 U. S. 371	96
Helvering v. *Hallock*, 309 U. S. 106	98
Hopkins v. *United States*, 171 U. S. 578	29, 35
Hooper v. *California*, 155 U. S. 648	27, 28, 41
Hoopeston Canning Co. v. *Cullen*, 318 U. S. 313	50
Illinois Natural Gas Co. v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498	29, 124, 127
Indiana Farmers Guide Pub. Co. v. *Prairie Farmer Pub. Co.*, 293 U. S. 268	18, 19
Insurance Co. v. *Davis*, 95 U. S. 425	50
International Textbook Co. v. *Pigg*, 217 U. S. 91	18, 19
Jordon v. *Tashiro*, 278 U. S. 123	37, 49

Cases—Continued.

Page

Kidd v. *Pearson*, 128 U. S. 1 ..... 9, 26, 29, 35, 69, 81, 88, 98
La Tourette v. *McMaster*, 248 U. S. 465 59
Leisy v. *Harden*, 135 U. S. 100 26
Leloup v. *Mobile*, 127 U. S. 640 26
Liverpool Ins. Co. v. *Massachusetts*, 10 Wall. 566 28
Local 167 v. *United States*, 291 U. S. 293 ..... 67, 72
Lord v. *Steamship Co.*, 102 U. S. 541 81
Louisville Board Fire Underwriters v. *Johnson*, 133 Ky. 797, 119 S. W. 153 106
Maple Flooring Assn. v. *United States*, 268 U. S. 563 110
Mayor of New York v. *Miln*, 11 Pet. 102 69
McCarter v. *Firemen's Insurance Co.*, 74 N. J. Eq. 372, 73 Atl. 80 106
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33 124
Metzger v. *Cleveland & Adams & Son*, 28 Ins. L. J. 176 (Ind. 1899) (quoted in 21 A. L. R. 544) 106
Milk Control Board v. *Eisenberg Farm Products Co.*, 306 U. S. 346 124
Minnesota v. *Blasius*, 290 U. S. 1 30
Minnesota Rate Cases, 230 U. S. 352 ..... 28, 29, 69
Mulford v. *Smith*, 307 U. S. 38 98
Munn v. *Illinois*, 94 U. S. 113 27
Nashville C. Etc. Ry. v. *Alabama*, 128 U. S. 96 27
Nathan v. *Louisiana*, 8 How. 73 ..... 26, 27, 50
National Ins. Co. v. *Wanberg*, 260 U. S. 71 24
National Labor Relations Board v. *Bank of America*, 130 F. (2d) 624, certiorari denied, 318 U. S. 791, 792 ..... 21, 65
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 ..... 30, 72, 82, 96, 98
National Labor Relations Board v. *White Swan Co.*, 118 F. (2d) 1002, certiorari denied, 314 U. S. 648 40
New York Life Insurance Co. v. *Cravens*, 178 U. S. 389 28
New York Life Insurance Co. v. *Deer Lodge County*, 231 U. S. 495 ..... 17, 27, 28, 40, 125
Noble v. *Mitchell*, 164 U. S. 367 28
Northern Securities Co. v. *United States*, 193 U. S. 197 ..... 10, 66, 72, 88, 100, 102, 127
Northwestern Life Ins. Co. v. *Wisconsin*, 247 U. S. 132 28
Nutting v. *Massachusetts*, 183 U. S. 553 28
O'Gorman & Young v. *Hartford Fire Insurance Co.*, 282 U. S. 251 59
Oliver Iron Co. v. *Lord*, 262 U. S. 172 ..... 29, 35
Osborn v. *Oslin*, 310 U. S. 53 59
Parker v. *Brown*, 317 U. S. 341 ..... 26, 28, 124, 127
Parker v. *Motor Boat Sales, Inc.*, 314 U. S. 244 98
Paul v. *Virginia*, 8 Wall. 168 ..... 7, 8, 9, 22, 27, 28, 31, 32, 35
Pensacola Tel. Co. v. *Western Union*, 96 U. S. 1 18

Cases—Continued. Page

Pennsylvania Gas Co. v. *Public Service Commission*, 252 U. S. 23 124
People ex rel. Pinckney v. *New York Board of Fire Underwriters*, 7 Hun. 248 106
People v. *Aachen & M. F. Insurance Co.*, 126 Ill. App. 636 106
Phila. Fire Association v. *New York*, 119 U. S. 110 28
Pinckney, In re, 47 Kans., 89, 27 Pac. 179 ..... 59, 106
Pipe Line Cases, 234 U. S. 548 18
Polish National Alliance v. *National Labor Relations Board*, No. 226, this Term 15
Port Richmond Ferry Co. v. *Hudson County*, 234 U. S. 317 124
Queen Insurance Co. v. *State*, 86 Tex. 250, 24 S. W. 397 107
Railroad Company v. *Fuller*, 17 Wall. 560 .....
Railroad Co. v. *Husen*, 95 U. S. 465 26
Ramsey Co. v. *Associated Bill Posters*, 260 U. S. 301 18
Rhodes v. *Iowa*, 170 U. S. 412 26
Robbins v. *Shelby County Taxing District*, 120 U. S. 489 27
The Schooner Nymph, 18 Fed. Cas. No. 10388 49
Securities and Exchange Commission v. *Joiner Leasing Corp.*, No. 24, decided Nov. 22, 1943 ..... 18, 41
Securities and Exchange Commission v. *Universal Service Association*, 106 F. (2d) 232 41
The Shreveport Case, 234 U. S. 342 99
Smith v. *Alabama*, 124 U. S. 465 27
South Carolina Highway Department v. *Barnwell Bros.*, 303 U. S. 177 124
Southern Pacific Co. v. *Jensen*, 244 U. S. 205 96
Spence v. *Johnson*, 142 Ga. 267 49
Stafford v. *Wallace*, 258 U. S. 495 ..... 30, 49, 72
Standard Oil Co. v. *United States*, 221 U. S. 1 81
State v. *American Surety Co.*, 91 Neb. 22, 135 N. W. 365 106
State v. *Phipps*, 50 Kan. 609, 31 Pac. 1097 106
State of California v. *Tagami*, 195 Cal. 522 49
State ex rel. Crow v. *Firemen's Fund Insurance Co.*, 152 Mo. 1, 52 S. W. 595 106
Sugar Institute v. *United States*, 297 U. S. 553 ..... 77, 113
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 32
Swift & Co. v. *United States*, 196 U. S. 375 ..... 30, 49, 66, 72, 81, 88
Thames & Mersey Ins. Co. v. *United States*, 237 U. S. 19 ..... 8, 9, 41, 50, 60, 61, 64
Thornton v. *United States*, 271 U. S. 414 17
United States v. *American Tel. & Tel. Co.* (D. Ore. 1913) No. 6082 104
United States v. *American Tobacco Co.*, 221 U. S. 106 81
United States v. *Association of American Railroads*, 36 F. Supp. 225 104
United States v. *Burch*, 226 Fed. 974 17
United States v. *Cassidy*, 67 Fed. 698 49

Cases—Continued.

	Page
United States v. *Coal Dealers' Assn.*, 85 Fed. 252	49
United States v. *Columbia Gas and Electric Co.*, 27 F. Supp. 116	104
United States v. *Cooper Corporation*, 312 U. S. 600	99
United States v. *Darby*, 312 U. S. 100	66, 98
United States v. *Debs*, 64 Fed. 724	49, 72
United States v. *Ferger*, 250 U. S. 199	64
United States v. *Freightways* (N. D. Cal. 1943), No. 22075–R	104
United States v. *General Motors Acceptance Corporation*, 121 F. (2d) 376, certiorari denied, 314 U. S. 618	41, 66, 67
United States v. *Great Lakes Steamship Co.* (N. D. Ohio 1928), No. 2456	104
United States v. *Great Lakes Towing Co.*, 208 Fed. 733, 217 Fed. 656	104
United States v. *Hill*, 248 U. S. 420	18
United States v. *Joint Traffic Association*, 171 U. S. 505	102
United States v. *E. C. Knight Co.*, 156 U. S. 1	29, 35, 72, 81, 82, 88, 98
United States v. *Lehigh Valley R. Co.*, 254 U. S. 255	102
United States v. *Nevada Northern Ry. Co.* (D. Nev. [illegible]), No. 8856	104
United States v. *New York, New Haven and Connecticut R. Co.* (S. D. N. Y. 1914), Eq. 11-301	104
United States v. *Northern Pacific Wharves and Trading Co.*, 4 Alaska 552	104
United States v. *Pacific & Arctic Ry. Co.*, 228 U. S. 87	104
United States v. *Patten*, 226 U. S. 525	20, 60, 72
United States v. *Patterson*, 55 Fed. 605	49
United States v. *Postal Tel. & Cable Co.* (S. D. N. Y. 1937), Eq. 86-128	104
United States v. *Pullman Co.*, 50 F. Supp. 123	104
United States v. *Reading Comp[illegible]*, 253 U. S. 26	102
United States v. *St. Louis Term[illegible]*, 224 U. S. 383	
United States v. *Southern Pacific Co.*, 259 U. S. 214	102
United States v. *Simpson*, 252 U. S. 465	18
United States v. *Terminal Railroad Association*, 224 U. S. 383	102
United States v. *Trans-Missouri Freight Association*, 166 U. S. 291	10, 102, 103
United States v. *Union Pacific R. Co.*, 226 U. S. 61	102
United States v. *Wrightwood Dairy Co.*, 315 U. S. 110	67, 72, 98
Valvoline Oil Co. v. *United States*, 308 U. S. 141	18
Veazie v. *Moor*, 14 How. 568	29, 81
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	18
Western Live Stock v. *Bureau of Internal Revenue*, 303 U. S. 250	7, 33, 98
Western Union Tel. Co. v. *James*, 162 U. S. 650	27
Wickard v. *Filburn*, 317 U. S. 111	25, 29, 30, 49, 66, 72, 82, 98

Federal Statutes: Page

Act of February 14, 1903, establishing Department of Commerce and Labor, 32 Stat. 825, c. 552, § 6 86

Agricultural Adjustment Act of 1933, Agricultural Marketing Agreement Act of 1937, §§ 8b and 8d (1), 48 Stat. 31, 48 Stat. 528, 49 Stat. 753, 50 Stat. 246, 7 U. S. C. § 608b 101

Agricultural Adjustment Act, §§ 56 and 57, 49 Stat. 781, 7 U. S. C. 851-852 101

Bituminous Coal Act of 1937, § 4I (d) and 12, 50 Stat. 72, 15 U. S. C. §§ 832 (d), 842 102

Capper-Volstead Act, §§ 1-2, 42 Stat. 388, 7 U. S. C. § 291 101

Consolidations and Mergers of Telegraph Carriers—Public Law No. 4, 78th Cong., 1st Sess., March 6, 1943 (amending Communications Act of 1934) 102

Emergency Railroad Transportation Act of 1933, § 10 (a), 48 Stat. 215; 48 Stat. 1740, 49 Stat. 376, 49 U. S. C. § 260 101

Marine Insurance Association Act, § 29 (a) and (b), 41 Stat. 988, 1000, 46 U. S. C. § 885 101

Merchant Marine Act, 41 Stat. 1000, Sec. 29, 46 U. S. C., Sec. 885 ..... 89, 90

Motor Carrier Act, § 213 (f), 49 Stat. 555, 557, 49 U. S. C., § 313 101

National Industrial Recovery Act, § 48 Stat. 198 102

National Stolen Property Act, 18 U. S. C. §§ 413-419 21

Sherman Act, 26 Stat. 209, as amended, 15 U. S. C., §§ 1-7:

Sec. 1 ..... 2, 69

Sec. 2 ..... 3, 69

Sec. 3 40

Shipping Act, 1916, §§ 1, 15, 39 Stat. 728, 733, 46 U. S. C., §§ 801, 814 101

Webb Export Trade Act, §§ 1-5, 40 Stat. 516, 15 U. C. C. §§ 61-65 101

State Statutes:

Alabama:

L. Ala. 1896-97, No. 634, p. 1428 [repealed: Ala. Gen. Acts 1923, No. 359, p. 381] 105

Arizona:

L. Ariz. 1912, ch. 73, p. 354 [Ariz. Code Ann. (1939), § 74-101 *et seq.*] 106, 128

Arkansas:

Ark. Acts 1905, No. 1, p. 1, as amended by Ark. Acts 1907, No. 184, p. 430 [Ark. Stat. (Pope, 1937), §§ 9407, 9408] 105

Ark. Stat. (Pope, 1937), § 7730 128

Ark. Stat. (Pope), §§ 7730, 7733-7735 129

Colorado:

Colo. Stat. Ann. (1935) ch. 87, §§ 157-160 128

State Statutes—Continued.

Georgia:
L. Ga. 1890-91, No. 745, p. 206 [Ga. Code Ann. (1937), § 53-219] ..... Page 105, 128
Idaho:
Idaho Code Ann. (1932), § 40-1001 129
Illinois:
Jones' Ill. Stat. Ann. (1939), §§ 66.1099-66.1115 129
Indiana:
Ind. Stat. Ann. (Burns, 1933), § 39-4310 (1) 129
Ind. Stat. Ann. (Burns, 1933), §§ 39-4310 (1)-(o) 128
Iowa:
L. Iowa 1896-97, ch. 22, p. 31 [Iowa Code (1939), § 9010] 105, 128
Kansas:
L. Kan. 1889, ch. 257, p. 389; L. Kan. 1897, ch. 265, p. 481 [Gen. Stat. Kan. (Corrick, 1935) §§ 50-101, 50-112] 105, 128
Gen. Stat. Kan. (Corrick, 1935) § 40-913 128
Kentucky:
Ky. Rev. Stat. (1942) § 298.200 128
Louisiana:
Acts La. 1912, No. 224, p. 509 [La. Gen. Stat. (Dart, 1939) § 4173, *et seq.*] 106
La. Gen. Stat. (Dart, 1939) § 4222 128
Maine:
L. Maine 1893, ch. 285, p. 339 [repealed: L. Maine 1895, ch. 20, p. 24] 105
Michigan:
L. Mich. 1887, No. 285, p. 384 [Mich. Stat. Ann. (Henderson, 1937) § 24.99] 105
Mich. Stat. Ann. (Henderson, 1937) § 24.51 128
Mich. Stat. Ann. (Henderson 1937) §§ 24.52, 24.54, 24.99-24.101 129
Minnesota:
Minn. Stat. (1941) § 71.06 128
Mississippi:
Miss. Code 1906, § 5002, adopted L. Miss. 1906, ch. 101, p. 78 105
Miss. Code Ann. (1930) § 5311 128
Miss. Code Ann. (1930) § 5302 129
Missouri:
L. Mo. 1895-97, p. 237 [Mo. Rev. Stat. Ann. (1943), §§ 8302, 8304, 8307, 8311, 8317] 105
Mo. Rev. Stat. Ann. (1943) § 5084 128
Mo. Rev. Stat. Ann. (1943) §§ 5972, 8302, 8304 129
Montana:
Mont. Rev. Code Ann. (1935), § 6136 121

State Statutes—Continued.

Nebraska: Page

L. Neb. 1897, ch. 79, p. 347 106

L. Neb. 1897, ch. 81, p. 354 105

L. Neb. 1913, ch. 154, p. 419 [Comp. Stat. Neb. (1929) §§ 44-321, 59-101, and 59-301] 105, 128

Comp. Stat. Neb. 1929, § 44-704 121

Nevada:

Nev. Comp. L. (Supp. 1931-1941) § 3656.121 128

New Hampshire:

L. N. H. 1885, ch. 93, p. 289 [Rev. L. N. H. (1942) ch. 325, § 15] 105, 128

New Jersey:

N. J. Stat. Ann. (1939) § 17.29-6 129

New Mexico:

N. M. Stat. (1941) § 60-610 129

New York:

27 McKinney's Cons. L. Ann. (N. Y. 1940) §§ 184 (4) and 186 128

27 McKinney's Cons. L. Ann. (N. Y. 1940) §§ 181, 183-186 129

27 McKinney's Cons. L. Ann. (N. Y. 1940) § 181 (7) 133

27 McKinney's Cons. L. (N. Y. 1940) § 319 121

North Carolina:

P. L. N. C. 1905, ch. 429, p. 429, and P. L. N. C. 1915, ch. 166, p. 243 [N. C. Code (Michie, 1939) § 6432] 105, 133

N. C. Code (Michie, 1939) § 6388-6393) 129

North Dakota:

L. N. D. 1925, ch. 153, p. 181 [Comp. L. N. D. (Supp. 1913-1925), § 406a1] 106, 133

L. N. D. 1929, ch. 152, §§ 1-3 129

Ohio:

L. Ohio 1885, No. 284, p. 231 [Throckmorton's Ohio Code Ann. (Baldwin, 1940) § 9563] 105

Throckmorton's Ohio Code Ann. (Baldwin, 1940) § 9592-12 through 9592-14 129

Oklahoma:

Okla. Stat. (1941) Title 36, § 134 128

Oregon:

Gen. L. Ore. 1909, ch. 230, p. 390 [Ore. Comp. L. Ann. (1940) § 101-142] 106, 133

Ore. Comp. L. Ann. (1940) §§ 101-142, 101-1605 (1), 101-1605 (8) 129

Pennsylvania:

Pa. Stat. Ann. (Purdon, 1930) Title 40, §§ 53-55 129

South Carolina:

Acts S. C. 1902, No. 574, p. 1057 [Code S. C. (1942) § 6624 et seq.] 105

Code S. C. (1942), § 8016 128

Code S. C. (1942) §§ 8003-8014, 8016 129

Code S. C. (1942) § 8018 133

State Statutes—Continued.

South Dakota:

L. S. D. 1903, ch. 158, p. 183 [S. D. Code (1939) § 31.2310] — Page 105

S. D. Code (1939) § 31.3705 — 128

Tennessee:

Acts Tenn. 1905, ch. 479, p. 1019 [amended: Pub. Acts Tenn. 1919, ch. 8, p. 32, repealed: Pub. Acts Tenn. 1919, ch. 33, p. 82] — 105

Texas:

G. L. Tex. 1903, ch. 94, p. 119 [Vernon's Rev. Civ. Stat. (Tex. 1939) Art. 7426] — 105

Vernon's Rev. Civ. Stat. (Tex. 1940) Art. 4878 et seq. — 128

Vermont:

Vt. Pub. L. (1933) §§ 7118–7126 — 129

Vt. Pub. L. (1933) § 7124 — 133

Virginia:

Acts Va. 1865–1866, c. 2, sec. 47; c. 96 — 23

Acts Va. 1898, ch. 644, p. 683 [repealed: Acts Va. 1901–2, ch. 615, p. 729] — 105

Va. Code (1942), §§ 4314 (1), 4314 (8) — 6, 128

Washington:

Sess. L. Wash. 1911, ch. 49, p. 195 and Sess. L. Wash. 1915, ch. 97, p. 278 [Remington's Rev. Stat. (Wash., 1932) § 7076] — 106

Remington's Rev. Stat. Ann. (Wash., 1932) §§ 7076, 7118, 7119 — 129

Remington's Rev. Stat. Ann. (Wash. 1932), § 7153 — 119

West Virginia:

W. Va. Code (1941 Cum. Supp.) § 3379 (d) — 128

W. Va. Code (1941 Cum. Supp.) §§ 3370–3372 and 3379 (d) — 129

Wisconsin:

L. Wis. 1897, ch. 356, p. 908 [Wis. Stat. (1941), § 203.23] — 105

Wis. Stat. (1941) § 203.39 — 128

Wis. Stat. (1941) §§ 203.33–203.34, 203.39–203.40 — 129

Wyoming:

Wyo. Rev. Stat. (1931) § 57–217 — 128

Wyo. Rev. Stat. (1931) §§ 57–216, 57–217 — 129

Federal Congressional material:

21 Cong. Rec. 2457, Senator Sherman — 73

21 Cong. Rec. 2460, Senator Sherman — 73

21 Cong. Rec. 2556–2557, Senator Turpie — 73, 80

21 Cong. Rec. 3147, Senator George — 73

21 Cong. Rec. 3148, Senator Edmunds — 77

21 Cong. Rec. 4091, Representative Culberson — 74

21 Cong. Rec. 4099, Representative Cannon — 73

Federal Congressional material—Continued.

	Page
21 Cong. Rec. 5950, House Conferees Report on Sherman Act	74
21 Cong. Rec. 6116, Senator Edmunds	75
21 Cong. Rec. 6313, Representative Enloe	75
21 Cong. Rec. 6313, Representative Kerr	75, 78
21 Cong. Rec. 6314, Representative Stewart	76
33 Cong. Rec. 3647–3655	95
33 Cong. Rec. 3652–3653, Representative McRae	94
33 Cong. Rec. 3655	94
33 Cong. Rec. 3644–3646, H. R. 2283	94
33 Cong. Rec. 6307–6328, 6335–6336, 6348–6349, 6396–6426, 6488	83
33 Cong. Rec. 6312, Representative Ray	83
33 Cong. Rec. 6319, Representative Terry	83
33 Cong. Rec. 6426, 6476–6502	84
34 Cong. Rec. 2726–2734, 3438, 3439	84, 86
51 Cong. Rec. 9390, Representative Barton	88, 89
51 Cong. Rec. 9390, Representative Webb	88, 89
Hearings, House Subcommittee on the Merchant Marine and Fisheries, 66th Cong., 1st sess., p. 283	54
House Committee on the Merchant Marine and Fisheries, Recommendations of Subcommittee of, printed with S. S. Huebner, *Report on Status of Marine Insurance in the United States*, p. 78, Government Printing Office, 1920	91
H. J. Res. No. 138, 56th Cong., 1st sess	83
H. R. 9629, 52d Cong., 1st sess	93
House Report No. 1501, 56th Cong., 1st sess	83
House Report No. 2491, 59th Cong., 1st sess	87, 88
Roosevelt, Theodore, President, Messages to Congress, 1904 and 1905	87
S. 2736, 55th Cong., 2d sess	93
S. 7277, 58th Cong., 3d sess	93
Senate Report No. 573, 66th Cong., 2d sess	90
Cong. Globe, Pt. 2, 1669, S. 299, 40th Cong., 2d sess	25
Miscellaneous:	
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia (R. 17–20) is reported in 51 F. Supp. 712.

JURISDICTION

The order of the District Court dismissing the indictment was entered on August 5, 1943 (R. 20–21). The petition for appeal was presented and allowed on August 30, 1943. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 345, and the Criminal Appeals Act of March

2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Sec. 682.

QUESTIONS PRESENTED

1. Whether the fire insurance business is in commerce.

2. Whether the fire insurance business is subject to the constitutional power of Congress to regulate commerce among the several states.

3. Whether, if so, the Sherman Act is violated by an agreement among fire insurance companies to fix and maintain arbitrary and non-competitive rates and to monopolize trade and commerce in fire insurance, in part through boycotts directed at companies not part of the conspiracy and the agents and purchasers of insurance who deal with them.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C., secs. 1 and 2, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

STATEMENT

On November 20, 1942, the grand jury in the Northern District of Georgia returned an indictment against South-Eastern Underwriters Association (referred to as SEUA), an unincorporated association composed of stock fire insurance companies doing business in Alabama, Florida, Virginia, North Carolina, South Carolina, and Georgia; nearly 200 stock fire insurance companies which are members of SEUA; and 27 individuals who are officers or members of the executive committees of SEUA.

Count 1 of the indictment avers that appellees conspired to fix and maintain arbitrary and noncompetitive premium rates on fire insurance in restraint of the interstate trade and commerce described in the indictment (R. 10–12), and Count 2 charges that appellees conspired to monopolize trade and commerce in fire insurance in order to exclude others from engaging in the sale of fire insurance in interstate commerce (R. 13–14).

Each count charges that the conspiracy consisted of agreements among appellees to sell insurance and to pay commissions to agents at rates

fixed by the Association, and to withhold reinsurance facilities from, and prevent access to such facilities by, non-members of the Association (R. 11, 13). It is further charged that appellees have threatened to refuse and actually refused to deal with any agency which represents companies not members of the Association, have agreed to disparage and have disparaged the services and facilities of such companies, and have threatened to boycott and withhold patronage from persons purchasing fire insurance from such companies (R. 11, 13–14). It is averred that appellees have agreed to maintain and have maintained inspection and rating bureaus and local boards in order to police, strengthen and further the agreements and practices described (R. 11–12, 14).

The nature of the trade and commerce involved is set forth in paragraphs 13–20 of the indictment (R. 8–10). It is alleged that stock fire-insurance companies received about 85 percent of the fire insurance premiums in the United States, and that in 1941, appellees received approximately 90 percent of the amounts received by such companies in the six southeastern states (R. 8–9). In 1941 in those states, the premium income of the stock companies amounted to $52,000,000, of which $18,000,000 was paid out in losses (R. 8).

It is alleged that the appellees insure all kinds of properties, including industrial establishments,

instrumentalities of interstate commerce, and goods carried in commerce; that goods valued at billions of dollars are constantly moving in interstate commerce; and that fire insurance is essential in order to protect the shippers, consignees, warehousemen and common carriers of these goods against loss (R. 9).

The operations of the business through local and general agents are described (R. 9–10). It is alleged that the companies supervise these agents and maintain communication with them by mail, telegraph and telephone; that the agents solicit and issue policies subject to the disapproval of the companies, collect premiums, and transmit the amounts due to the companies and report losses; and that in case of loss, the companies mail to the agents checks or drafts for delivery to the policyholders (R. 9–10).

The states in which the appellees have their home offices are listed (R. 10). Ninety-three of the appellees maintain their home offices in New York, eighteen in Pennsylvania, sixteen in Connecticut, ten in New Jersey, and the remainder in various other states, with only eighteen in the six southeastern states (R. 10). Some of the appellees are organized to conduct a nation-wide business, and many do business in numerous states other than those which contain their home offices (R. 10).

It is alleged that the six southeastern states comprise the territory of the Association and that it maintains inspection and rating bureaus in Alabama, Florida, Georgia, North Carolina, and South Carolina (R. 10).*

On January 13, 1943, appellees filed a demurrer to the indictment upon the grounds that it did not state facts sufficient to constitute an offense against the United States, that the business of fire insurance is not commerce, and that the indictment is based upon an interpretation and application of the Sherman Act which would violate the Tenth, Fifth and Sixth Amendments to the Constitution.

On August 5, 1943, the District Court sustained the demurrer on the ground that in a proceeding under the Sherman Act the conduct restrained must be interstate trade or commerce, and that the decisions of this Court established that the business of insurance was not commerce.

SUMMARY OF ARGUMENT

I

A. The performance of the fire insurance contract and the operation of the fire insurance business require the movement of money, information, and documents on a large scale across state lines. These activities are both interstate and

* Virginia requires the fire insurance companies to establish a single rating bureau under the supervision of the State corporation commissioner. Va. Code 1942, § 4314 (1).

commerce within the meaning of the Constitution. Interstate commerce consists of all movement and intercourse across state lines, and most certainly includes all interstate transactions which are related to business and commerce in the narrowest sense.

B. *Paul* v. *Virginia,* 8 Wall. 168, and the cases following it, decide only that the states have power to regulate or tax the insurance business. The repeated statement in these cases that "insurance is not commerce" arose out of the Court's concern that otherwise the power of the states could not be sustained. But it is now established that even if interstate commerce is involved, the states may regulate matters not of national concern, and that cases relating to the scope of state power are of little value in ascertaining the extent of the power of Congress. Furthermore, the insurance business does not consist of isolated individual contracts of indemnity in which the only interstate feature is the transmission of the policy. The fire insurance business would not exist in its present magnified form, with the geographically diversified risks which insure its solvency, if it were not for the continuous use of the channels of interstate commerce for the transmission of instructions, information, papers, and money. These activities, which include the performance of the insurance contract, are unquestionably interstate commerce (cf. *Western Live Stock* v. *Bureau of Internal Revenue,* 303 U. S. 250, 253).

C. The insurance decisions are inconsistent with the many broad definitions of commerce stemming from *Gibbons* v. *Ogden*, 9 Wheat. 1, in which it has been recognized that commerce connotes every form of business activity. In particular, the insurance cases cannot be reconciled with (1) the decision that lottery tickets are subjects of commerce (*Champion* v. *Ames*, 188 U. S. 321), (2) the decision that an enterprise engaged in providing protection against the risk of undue medical expense is "trade" within the meaning of the Sherman Act (*American Medical Association* v. *United States*, 317 U. S. 519), and (3) the decision that marine insurance is an integral part of exportation, which is itself commerce (*Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19).

D. The statement that "insurance is not commerce" is also inconsistent with the meaning of "commerce" during the period in which the Constitution was adopted, as well as in more recent years. This appears from the usage of the eighteenth century, including that of members of the Constitutional Convention, from that of this Court in cases other than the series based upon *Paul* v. *Virginia*, and from that of the business and legal worlds generally. All agree that "commerce" embraces every phase of commercial and business activity, and that this includes insurance.

E. Furthermore, fire insurance may be regulated under the commerce power because it is

"practically a necessity to business activity and enterprise" (*German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 414; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19). Congress has power to regulate and safeguard the availability of an instrumentality so essential to commerce. The nation-wide scope and the tremendous magnitude of the insurance industry also demonstrate that it falls within the limits of the federal commerce power.

II

A. The Sherman Act forbids every contract or combination "in restraint of trade or commerce among the several states." If the insurance business is in commerce, appellees' conduct plainly is proscribed by the literal language of the Act (cf. *American Medical Association* v. *United States*, 317 U. S. 519).

B. The history of the Act shows, and this Court has recognized, that Congress employed the words of the Constitution in the antitrust law for the very purpose of availing itself of all its constitutional power over restraints of trade. As in the Constitution itself, general terms were used with the understanding that they would be defined by the courts as cases arose. Although there was awareness of *Paul* v. *Virginia*, as there was of *Kidd* v. *Pearson*, 128 U. S. 1 and other cases holding that manufacture and production were not

subject to the Federal commerce power, there was no legislative intention, in the one case or the other, to freeze the Act in the judicial mold of 1890, or to deprive the Court of its prerogative to determine whether to adhere to prior decisions.

C. Nothing occurring since 1890 manifests a legislative intention that an exemption for insurance be read into the terms of the Sherman Act. Congressional references to the "insurance trust," the analogy of the manufacturing cases, the history of an exemption proviso for marine insurance, *inter alia*, suggest that Congress had no desire to give insurance preferential treatment if the Court should modify its constitutional views. Isolated instances which appellees cite do not sustain their burden of showing that the Act should not be construed to mean what it says.

D. Nor should an exemption be read into the Sherman Act upon the theory that competition among insurance companies is detrimental to the public interest. Such arguments have been made in the past and been uniformly rejected on the ground that such matters were for legislative and not judicial consideration. (See *Northern Securities Co.* v. *United States*, 193 U. S.; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 291.)

The enactment during the era of hostility to monopoly of twenty-three state antitrust laws specially directed at insurance companies demonstrates the climate of legislative opinion when the

Sherman Act was passed. Furthermore, analysis of the arguments as to why unrestrained competition among fire-insurance companies may be unwise, in the light of the rule of reason, the actual methods of operation in the industry, and the presence of existing and valid state regulations, demonstrates that application of the Sherman Act to fire insurance will not have any dire consequences, and that appellees have not made out such a case for special treatment as to warrant reading a special exception into the law.

E. Appellees' argument that a reversal of this Court's past doctrine would nullify the present state regulatory systems is irrelevant and exaggerated. Even if insurance is commerce within the meaning of the Constitution, the states are not precluded from taxing or regulating it, and the insurance decisions stand legitimately for the proposition that in the absence of a conflicting federal law, state regulation of the industry is appropriate. Nor is there merit in the contention that application of the Sherman Act will result in any general destruction of state regulatory systems. Furthermore, none of the state laws go so far as to authorize or justify the coercive tactics charged to appellees in this case.

ARGUMENT

INTRODUCTION

Appellees are charged with agreeing on the "price" of fire insurance (Count 1), and with

conspiring to monopolize the fire insurance business through coercion and boycotts directed at companies not members of the Association and at persons purchasing fire insurance from such companies (Count 2).[1] Such conduct in other industries unquestionably violates the Sherman Act when it relates to interstate commerce.

Appellees' primary contention in the court below was not that interstate commerce was not in fact restrained, or even that Congress lacked power under the commerce clause to regulate the insurance business, but that Congress had not done so in the Sherman Act. It is our position that Congress has such power, and that the Sherman Act is an exercise of all the power contained in the commerce clause with respect to restraints of the type in question.

Notwithstanding appellees' failure to press the constitutional objection below, the decisions of this Court make it necessary to deal with the constitutional issue. In Point I we shall show that the commerce power extends to appellees' activities because the fire-insurance business as carried on by appellees is both commerce and interstate commerce and because a restraint or monopoliza-

[1] Appellees have treated the case as one involving only the fixing of insurance rates, and argue that unrestricted rate competition would be unwise from an economic viewpoint. Whether or not the fixing of rates can be so justified, the justification would not extend to the boycotts, coercion, or other monopolistic tactics described in Count 2 of the indictment. See pp. 3–4, *supra*.

tion of that business burdens the commerce in the interstate industries insured. In Point II we shall consider appellees' contentions that an exemption in favor of insurance monopolies should be read into the sweeping language of the Sherman Act.

I

Appellees' Fire Insurance Business is Subject to the Federal Commerce Power

The Pertinent Facts

Although the case comes up on a record consisting solely of a pleading and a demurrer, the controlling facts as to the nature of the fire-insurance business are relatively few, and the indictment adequately summarizes them. Pertinent facts alleged that are not of common knowledge can readily be confirmed through resort to judicially noticeable descriptions of the fire-insurance business.[2]

Fire insurance is sold almost entirely by companies conducting a multistate business. Each company has a home office from which its activities radiate to the various states in which it sells insurance (R. 9–10). Over 87% of the business

[2] W. F. Gephart, *Principles of Insurance*, Vol. II: Fire (New York, 1917); S. S. Huebner, *Property Insurance* (New York, 1922), Part I, Fire Insurance; Albert W. Mowbray, *Insurance, Its Theory and Practice in the United States* (New York, 1937), chapters I–VI, XVI, XVII, XIX, XX, XXI; Prentiss B. Reed, *Fire Insurance Underwriting* (New York, 1940).

of the appellee companies is derived from states other than the home state.[3] Only 18 of the 196 appellees have their headquarters in the six southeastern states covered by the indictment (R. 10).

The fire insurance companies appoint general and local agents.[4] These agents, who are subject to company supervision, solicit prospects and accept or reject offers for insurance; the contracts are, however, subject to cancellation by the companies "as they deem fit" (R. 9). The contracts are performed on the part of the insured by the payment of premiums to the company. The premiums are collected by the local agents, and periodically are forwarded, minus the commissions due the agents, to the companies' home offices (R. 9, 10). The contracts are performed by the company by the payment of money to the insured if a loss occurs. After the amount of the loss has been determined, the company sends a check or draft to the local agent for delivery to the policy holder (R. 10). On the policies

[3] We have printed as an Appendix, *infra*, a tabulation from *Best's Insurance Reports, Fire and Marine Edition*, 1942, which shows the proportionate amount of premium income which each of the appellee companies (with minor exceptions) derives from the home state and from other states. The table shows that all but seven extremely small companies do business outside of the home State, and that of the companies whose total premium income exceeded two million dollars, the maximum percentage of business done in the home state was 39.51.

[4] Sometimes the general agents appoint and supervise the local agents (R. 9).

made outside of the home state, the money paid to the company by the insured and by the company to the insured in case of loss, crosses state lines.

The control exercised by the companies over the agents is illustrated by the requirement that the agents mail daily reports to the company (R. 9); the companies supervise the agents' activities, communicating with them by mail, telegraph, and telephone, send them blank forms of policies,[5] and as we have indicated, retain the right to cancel any contract made by the agents (R. 9).

The making of each contract for fire insurance is not to be regarded as an isolated transaction. The fire-insurance business exists only because the companies are able to issue a large number of policies covering many properties. An individual property owner can obtain insurance only because the risk of loss is widely spread. Indeed, the needs of the fire-insurance business require that each company spread its risks over a large geographical area, in order that a crippling loss may not result from a single conflagration.[6] The consequence is that the very nature of

[5] In this respect fire insurance differs from life insurance; the life insurance policy is prepared in and sent from the home office. Moreover, it has a security and investment value of its own. This will be developed in the brief for the Government in *Polish National Alliance* v. *National Labor Relations Board*, No. 226.

[6] See Zartman and Price, *Yale Readings in Insurance: Property Insurance* (1914) pp. 339–340; Dean, Albert F., *The*

the business causes the companies to operate in many states rather than as local concerns.[7] The scope of the business appears from the fact that in 1941 the premiums received by the stock fire insurance companies from the six southeastern states amounted to over $52,000,000 (R. 8);[8] in the United States the amount was $886,764,876.[9]

The properties insured by appellees include both homes and all types of businesses. Vessels, trucks and busses, railroad equipment and rolling stock, hangars, shipyards, warehouses, terminals, and all kinds of goods and merchandise transported in interstate commerce are covered by fire insurance (R. 9). Fire insurance protects shippers, warehousemen, and carriers against the risk of loss of property used in interstate business. "Fire insurance coverage is essential to and directly affects the flow of interstate commerce" (R. 9).[10]

Philosophy of Fire Insurance (1925), Vol. 1, pp. 109–110; Mowbray, A. H., *Insurance, Its Theory and Practice in the United States* (1937), pp. 360, 370.

[7] Cf. Dean, *loc. cit.*

[8] *Best's Insurance Reports*, 1942. Of this amount the appellee companies received approximately 90% (R. 8). Approximately $18,000,000 was paid out in losses (R. 8).

[9] See the table printed in Appendix, *infra*, compiled from *Best's Insurance Reports*.

[10] The sentence quoted from the indictment states a fact and not a conclusion of law. It epitomizes the experience of businessmen who would be reluctant to undergo the risk of engaging in these activities without protection against loss by fire. (See pp. 61–63, *infra*.)

A. THE INSURANCE BUSINESS IS IN INTERSTATE COMMERCE

These facts demonstrate that both the performance of the contract of insurance and the operation of the fire-insurance business viewed as a whole require the movement of money, information, and documents on a large scale across state lines. It cannot be, and we do not think that it is, questioned that these activities are interstate.[11] The contention has been that they are not "commerce."

This presupposes that some forms of movement and intercourse across interstate lines are not interstate commerce in the constitutional sense. Except for the line of cases dealing with insurance, our views as to the erroneous character of which are advanced *infra*, pp. 22–69, the decisions of this Court are to the contrary and establish that all movement across state lines is interstate commerce. Cattle ranging across state lines are in commerce.[12] So is the moving of a woman from one state to another to engage in an immoral but noncommercial activity;[13] a kidnapper holding a public officer for protection and not for ransom;[14]

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[11] Cf. *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 510.

[12] *Thornton* v. *United States*, 271 U. S. 414.

[13] *Caminetti* v. *United States*, 242 U. S. 470. Cf. *United States* v. *Burch*, 226 Fed. 974 (N. D. Cal.) (transportation by private automobile).

[14] *Gooch* v. *United States*, 297 U. S. 124.

and a person walking across an interstate bridge.[15] A bottle of liquor carried across a state line by a man for his personal use,[16] and oil transported in a private interstate pipe line for the use of the carrier are in commerce.[17] The sending of information, whether by telegraph, telephone, or radio is unquestionably interstate commerce.[18] And the interstate transmission of pieces of paper, which are more tangible than electric waves but which may have no intrinsic value of their own[19] apart from the rights they represent, is also interstate commerce. This is true not only as to paper money and securities, which often contain only a promise to pay,[20] but also of lottery tickets,[21] the value of

[15] *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204.

[16] *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465. In the *Simpson* case the transportation was by private car and not by common carrier.

[17] *Pipe Line Cases*, 234 U. S. 548; *Valvoline Oil Co.* v. *United States*, 308 U. S. 141.

[18] *Pensacola Tel. Co.* v. *Western Union*, 96 U. S. 1; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103.

[19] Paper, of course, is a commodity as much as anything else. Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52. This is true even when its value is created by what is printed on it. *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501 (posters); *Indiana Farmers Guide Pub. Co.* v. *Prairie Farmers Pub. Co.*, 293 U. S. 268; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

[20] *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, No. 24, decided Nov. 22, 1943; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 433.

[21] *Champion* v. *Ames*, 188 U. S. 321.

which is both contingent, and dependent, since they are unenforceable, upon the good faith of the seller. The performance of servicing contracts and of a correspondence course through the mails has been regarded as interstate commerce.[22]

These cases establish that interstate commerce consists of all kinds of movement across state lines whether or not "commercial" in the sense of business transactions. The historical background of the commerce clause, referred to *infra*, pages 42–48, shows that they were correctly decided. But it is not necessary to resort to any such broad principle in the present case. For we think it plain that the transmission of money by both parties in performance of a contract of insurance, and of information and instructions which are the essence of the insurance business commercial in the narrowest sense. It is certainly much more so than most of the transactions held to be interstate commerce in the foregoing cases.

We do not think this would ever have been doubted if the property which moved in performance of the insurance contract had not been money or checks, or if the performance on one side of the contract had not been contingent on the oc-

[22] *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; cf. *Indiana Farmers Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268.

currence of loss.[23] If a person in one state buys sugar to be shipped from another state, the contract of sale is both commerce and interstate commerce. Its commercial character would not be lessened if the obligation to ship the sugar were made contingent upon a certain event, particularly if the contingency had a real and vital relationship to the efficient and continuous operation of the seller's business.[24] Or let us suppose that persons with a lack of faith in the value of money establish an enterprise for insurance in kind. Manufacturers of sugar, for example,[25] might agree to ship a small percentage of their stock per month to a central warehouse; in case of fire the owner of the warehouse would ship back to them the amount of sugar destroyed. The transportation of the sugar to and from the warehouse would plainly be commerce, and if across state lines, interstate commerce. The transactions would be commercial in the strictest sense.

These cases differ from the present one only in that the performance of the insurance contract

[23] In life insurance only the time of performance by the company is contingent.

[24] Compare the purchase and sale of commodities for future delivery. *United States* v. *Patten*, 226 U. S. 525; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

[25] At one time, in the West Indies, sugar was used as a medium of exchange; cattle, salt, shells, dried cod, tobacco, hides and nails have also been so used (Adam Smith, *The Wealth of Nations* (1937 ed.), p. 23).

consists of the exchange of money (usually in the form of a bank check) instead of a more tangible commodity. But money and checks are undoubtedly subjects of commerce,[28] and the fact that a convenient medium of exchange is employed does not render a transaction non-commercial.

For these reasons the performance of the individual contract of insurance is a commercial transaction. Even more clearly—if that be possible—the widespread activities of the insurance companies viewed as a whole are commercial. Their business in large part consists of the transmission and receipt of vast sums of money and the unceasing use on a large scale of the channels of communication. It is the business of insurance that appellees are charged with monopolizing.

That the insurance business is commercial also appears from its relation to other industries. Manufacturers, carriers, and shippers carry insurance as an ordinary business expense. They do not dare risk the destruction of their property by fire; furthermore, they cannot obtain the credit to finance their enterprises unless the property

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[28] *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 626 (C. C. A. 9), certiorari denied, 318 U. S. 791, 792. The National Stolen Property Act specifically includes money within the types of stolen property to which it applies, 18 U. S. C., §§ 413-419. The paucity of authorities for this proposition is probably accounted for by the fact that no one has ever doubted it.

is insured.[27] An operation which is so essential to commerce can hardly be described as non-commercial.

B. THE INSURANCE CASES[28] ARE NOT CONTROLLING

Paul v. *Virginia,* 8 Wall. 168 (1868), and the decisions following it can best be understood if placed in their proper legal and historical perspective.[29]

Upon the close of the Civil War the insurance business, along with industrial activity generally, underwent a tremendous expansion accompanied by abuses of the most flagrant sort.[30] "Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at headquarters, with lucrative employment—large compensation for light work—not for the purpose of insuring property; for the payment of expenses, not of losses" (*DeLancey* v. *Insurance Co.,* 52 N. H. 581, 587 (1873)). The Missouri Superin-

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[27] See p. 16, *supra;* pp. 61–64, *infra.*

[28] By the "insurance cases" we mean *Paul* v. *Virginia,* 8 Wall. 168, and the subsequent series of decisions stating that "insurance is not commerce." There are, of course, a great many other decisions dealing with the insurance business, some of which adopt quite a different approach.

[29] The historical background of *Paul* v. *Virginia* is set forth in Nehemkis, *Paul* v. *Virginia: The Need for Re-examination,* 27 Georgetown L. J., 519 (1939).

[30] See *Insurance Blue Book* (Centennial Issue, 1876–1877), c. VI, "Fire Insurance 1860–1869," pp. 29–34.

tendent of Insurance reported with respect to the same period that "some [insurance companies] kept but few books of any kind, and these in so slovenly a manner that even the officers could tell nothing about the entries. The agents covered the State, wrote on specious and novel plans, and defrauded without fear of penalty. The mutuals were most productive of fraud and mischief. There was nothing to prevent their organization by any poverty-stricken adventurer."[31]

In order to safeguard their citizens against such activities on the part of insurance companies, various states enacted protective legislation.[32] In 1866 Virginia enacted a law requiring insurance companies not incorporated in the state to obtain a license before doing business therein; such a license could not be obtained until bonds of a certain type (which were to be sold if necessary to satisfy the company's liabilities) were deposited with the state treasurer.[33] Paul, a Virginia resident, was appointed agent for several New York fire insurance com-

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[31] This report is quoted in *Insurance Blue Book*, *op. cit.*, *supra*, p. 34. See also Barnes, *First Annual Report of the Superintendent of the Insurance Department of the State of New York* (1860), 4.

[32] *Insurance Blue Book*, *supra*, n. 30. This legislation was also prompted by the general fear of the growing power of foreign corporations during the period preceding and immediately following the Civil War. See Nehemkis, *supra*, note — (cf. *Bank of Augusta* v. *Earle*, 13 Pet. 519).

[33] Acts Va., 1865–1866, c. 2, sec. 47; c. 96.

panies. He applied for a license, but refused to comply with the requirement for the deposit of bonds. The license was refused, but he nevertheless proceeded to sell insurance. He was indicted and convicted for having sold insurance in the state without a license.

During this period the insurance companies were seeking relief generally "from the aggressive acts of hostile [state] legislatures."[34] In 1868 a committee of the National Board of Fire Underwrifers reported on "the first duty" assigned to it, namely, "proposing some practicable plan to rid the country of unfair state legislation" and of "securing, if possible, one general law for the government of Insurance Companies throughout the Union."[35] The Committee also urged the necessity for a "test case in opposition to the more monstrous exactions of some of the States, and [to] obtain the decision of the Supreme Court of the United States thereon, with the view to settle forever the unconstitutionality of all such unequal and proscriptive State legislation."[36] Virginia's prosecution of Paul was to be the test case.

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[34] *Insurance Blue Book*, *op. cit.*, *supra*, n. 30, at 32; Nehemkis, *op. cit.*, *supra*, at 525.

[35] See, *National Board of Fire Underwriters*, *Journal of the Proceedings of the Second Annual Meeting* (*Proceedings of the Executive Committee*, February 18, 1868), 25.

[36] *Id.*, at 26.

The issue presented to the Court was whether the states were to have power to safeguard their citizens through the regulation of foreign fire insurance companies. There was no federal legislation on the subject; indeed, a bill submitted by the insurance companies and proposing federal incorporation in order to eliminate numerous restrictions imposed by the states had been rejected by Congress early in 1868.[37] Moreover, in considering the likelihood of control through effective legislation by Congress, the Court could not have been unaware that not a single regulation of business under the commerce power had been enacted by Congress in the seventy-nine years since the Constitution was adopted.[38] The Court was thus faced with the alternative of approving state regulation or, by striking it down, of leaving no effective check upon the irresponsible activities of insurance companies. Accordingly it sustained the validity of the Virginia bonding requirement, which, of course, was related to the protection of Virginia's citizens against dishonest or irresponsible insurers.

The Court could better have reached this conclusion by declaring that whether or not insur-

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[37] S. 299, 40th Cong., 2d Sess., Cong. Globe, 40th Cong., 2d Sess., Pt. 2, 1669. This occurred on March 5, 1868; *Paul* v. *Virginia* was decided in the December Term 1868.

[38] Such legislation was still two decades away. See *Wickard* v. *Filburn*, 317 U. S. 111, 121.

ance was commerce or interstate commerce, state regulation of the subject was to be upheld, because in view of "all the relevant facts and circumstances it appears that the matter is one which [in the absence of any federal law on the subject] may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." "When Congress has not exerted its power under the commerce clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." (*Parker* v. *Brown,* 317 U. S. 341, 362, 363).

In that period, however, and apparently despite the doctrine of *Cooley* v. *Board of Port Wardens,* 12 How. 299, the Court often applied a more formal test.[39] If a matter was interstate

[39] E. g., *Nathan* v. *Louisiana,* 8 How. 73; *Railroad Co.* v. *Husen,* 95 U. S. 465; *Coe* v. *Errol,* 116 U. S. 517; *Bowman* v. *Chicago & N. W. Railway Co.,* 125 U. S. 465; *Leloup* v. *Mobile,* 127 U. S. 640; *Kidd* v. *Pearson,* 128 U. S. 1; *Rhodes* v. *Iowa,* 170 U. S. 412; *Caldwell* v. *North Carolina,* 187 U. S. 622. Cf. *Leisy* v. *Hardin,* 135 U. S. 100. In other cases during the same period the Court applied the formula of

commerce, only Congress could regulate it; if it was not, only the states could regulate it. As the opinion in *Paul* v. *Virginia* states, in quoting from *Nathan* v. *Louisiana*, 8 How. 73:

> The federal government can no more regulate the commerce of a State than a State can regulate the commerce of the federal government.

In the cases following *Paul* v. *Virginia*, the Court showed that the basic reason for the decision was its fear that if insurance were held to be commerce and accordingly subject to the federal power, the effect would be to "exclude state control" (*Hooper* v. *California*, 155 U. S. 648, 655). The thought was most explicitly enunciated in *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 509; the Court there said:

> We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, then all control over it is taken from the States and the legislative regulations which this court has

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the *Cooley* case, which does not differ substantially from that presently approved. *Munn* v. *Illinois*, 94 U. S. 113; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville C. Etc. Ry.* v. *Alabama*, 128 U. S. 96; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Gladson* v. *Minnesota*, 166 U. S. 427. Cf. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

heretofore sustained must be declared invalid."[40]

Paul v. *Virginia* and the *Hooper* and *Deer Lodge* cases contain the most complete expressions of the reasoning behind the oft-repeated statement that "insurance is not commerce"; the other decisions in this line[41] do little more than follow or quote from them. All of the cases involve the validity of state tax and regulatory legislation, and we think it fair to say that in all of them the Court was primarily concerned with maintaining the power of the states to regulate the insurance business.

In *Parker* v. *Brown*, 317 U. S. 341, 360–363, the Court noted that prior decisions involving the validity under the commerce clause of state legislation had approached the problem in two ways. One group of cases applied a "mechanical test" and determined whether a particular state law was valid by ascertaining whether the conduct reg-

[40] This statement seems difficult to reconcile with the analysis in *The Minnesota Rate Cases*, 230 U. S. 352, decided at the preceding term. Mr. Justice Hughes, the author of the latter opinion, and Mr. Justice Van Devanter dissented in the *Deer Lodge* case.

[41] See *Ducat* v. *Chicago*, 10 Wall. 410 (1870); *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566 (1870); *Phila. Fire Association* v. *New York*, 119 U. S. 110 (1886); *Noble* v. *Mitchell*, 164 U. S. 367 (1896); *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389 (1900); *Nutting* v. *Massachusetts*, 183 U. S. 553 (1902); *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132 (1918); *National Ins. Co.* v. *Wanberg*, 260 U. S. 71 (1922); *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274 (1927).

ılated was interstate or intrastate. See cases ited, 317 U. S. at 360–361. Other decisions con- sidered whether the state law unduly burdens nterstate commerce, and the courts are reluctant o find undue interference where no national olicy is obstructed. See pp. 121–122, *infra* and *The Minnesota Rate Cases*, 230 U. S. 352, 400–411, and cases cited; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 505–506, and cases cited. Recent decisions in the main dopt the latter test.[42]

Although a number of the cases involving state egislation contain remarks suggesting that the ame mechanical test determines the scope of the ederal power,[43] only a few cases have actually pplied the rule to a federal regulation.[44] Except or the remarks in the insurance cases, these de- isions have been abandoned or repudiated.[45] It s by now definitely established that cases sustain- ng the validity of state laws are not to be taken s holding that Congress has no power under the ommerce clause to enter the same field. This Court has said time and again that cases uphold- ng state tax or regulatory statutes, "as not con-

[42] See cases cited pp. 121–122, *infra*.

[43] E. g., *Veazie* v. *Moor*, 14 How. 568; *Kidd* v. *Pearson*, 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172.

[44] *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *Employers' Liability Cases*, 207 U. S. 463.

[45] See *Wickard* v. *Filburn*, 317 U. S. 111, 121–123, and cases cited.

stituting an interference with interstate commerce, are of little value" (*Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311) when the inquiry is as to the scope of the powers of Congress. In such cases the question "is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority" (*Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace,* 258 U. S. 495, 526; *Swift & Co.* v. *United States,* 196 U. S. 375, 400; *Minnesota* v. *Blasius,* 290 U. S. 1, 8; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 35; *Binderup* v. *Pathe Exchange, supra;* cf. *Wickard* v. *Filburn,* 317 U. S. 111, 121).

These observations apply to the insurance cases, inasmuch as every one of them involved the validity of state legislation. The cases are therefore not controlling as to the scope of the power of Congress under the commerce clause.[46]

The emphasis upon the individual insurance policy as an isolated contract of indemnity also serves to differentiate the insurance cases from the facts at bar. The paragraph in *Paul* v. *Vir-*

[46] It follows that a decision in the instant cases that insurance is commerce and subject to the commerce power need not invalidate state taxes and regulations except to the extent that they are inconsistent with federal legislation. This is discussed at greater length, *infra,* pp. 121 *et seq.*

ginia from which its doctrine stems" shows that the Court was thinking solely in terms of the individual insurance contract, and of the transportation of the policy itself across state lines. The question was whether *the contracts* were "articles of commerce"; it was apparently assumed that nothing need be considered but the making of the contracts themselves, and that the performance took place entirely in Virginia.

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[47] This paragraph (8 Wall., at 183) reads as follows: "There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of idemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

We need not dispute the proposition that the mere making of a contract between persons in different states is not interstate commerce, or that it does not become so just because the written instrument is forwarded from one state to the other.[48] As we have shown, the indictment alleges that in performance of the fire-insurance contracts involved in this case money was sent across state lines both by the insured and by the companies; indeed, the parties undoubtedly contemplated that the contracts would be carried out through this use of the channels of interstate communication. When contracts require the interstate movement of property for their performance, the latter is both commerce and interstate commerce and plainly subject to the federal commerce power.[49] The implication in *Paul* v. *Virginia* that because the policies were contracts of indemnity they were not commercial transactions ignores these facts as to the manner in which insurance contracts are carried out.

In this case we are not concerned merely with insurance contracts but with the entire insurance business. Appellees are charged (Count 2)

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[48] But as to the latter, see pp. 17–19, *supra*. Life insurance policies have an investment value of their own and fall in a different category.

[49] A regulation of the terms of such contracts is a regulation of commerce itself (*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394).

with conspiring to monopolize the fire insurance business, and specifically with conduct designed to force out of business companies not members of their association. We have no doubt that the performance of an insurance contract constitutes commerce, even if the contract can be looked at as an isolated local transaction, as it was in *Paul* v. *Virginia*. But the business of insurance cannot be regarded as consisting either of isolated or local events. The fire insurance business would not exist in its present magnified form, with the geographically diversified risks which insure its solvency, if it were not for the continuous use of the channels of interstate commerce for the transmission of instructions, information, papers, and money. It is thus essentially an interstate business, the activities of which consist in large part of transactions in interstate commerce, that appellees are charged with monopolizing.

Our conclusion that the insurance cases are not controlling as to the validity of federal commerce legislation and that they are to be regarded as concerned only with the formation of contracts is confirmed by this Court's most recent reference to them. *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250, 253, cites the insurance cases as standing only for the proposition "that the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least

in the absence of Congressional action, unless the performance is within its protection • • •." This statement seems clearly to imply that if the performance, as well as the making, of a contract is interstate, the transaction is subject to the protection of the commerce clause, and that even the contract itself may be regulated if Congress so provides. The present cases fall within both these categories. The performance of insurance contracts, as we have shown, consists of the transmission of money across state lines. And both this case and No. 226 arise under federal commerce legislation which reaches all conduct of specified types which restrains or affects interstate commerce. If the insurance cases are authoritative only to the qualified extent indicated in the *Western Live Stock* case, they are not pertinent to the issues presented in the cases at bar.

Other considerations also demonstrate the error in the generalization that "insurance is not commerce." It can be shown that that oft-repeated remark (1) is inconsistent with many other decisions of this Court, (2) is contrary to the historical meaning of the commerce clause, and (3) is not in accord with present understanding. This statement should be relegated to the place occupied by few other decisions in which the commerce clause has been construed without the con-

sideration of economic relationships which would have led to a different result."

C. THE INSURANCE CASES ARE INCONSISTENT WITH OTHER DECISIONS OF THIS COURT

Paul v. *Virginia* and the subsequent cases apparently conceived of "commerce" as consisting only of the sale and shipment of tangible commodities. This position, we believe, was an acceptance of the very argument rejected in *Gibbons* v. *Ogden*, 9 Wheat. 1, this Court's first and justly most famous decision under the commerce clause, in which it was vigorously argued that for the same reason "commerce" did not include navigation. Indeed, it is difficult to find a more discerning reply to the argument than that given by Chief Justice Marshall in 1824. His opinion states the contention and answers it as follows (9 Wheat., at 189):

> The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation.

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[30] *Hopkins* v. *United States*, 171 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Carter* v. *Carter Coal Co.*, 298 U. S. 238. Sweeping statements found in cases sustaining state laws as to the limitations of the federal commerce power have also been disregarded (E. g., *Kidd* v. *Pearson*, 128 U. S. 1, 20–22; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259–260; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178–179).

> This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

In his concurring opinion in the same case, Mr. Justice Johnson further amplified the definition of "commerce."

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation.[51]

The activities of insurance companies are well described in the reference to "intelligence, care, and various mediums of exchange" as entering into commerce.

If we turn to more recent cases, the fallacy of the notion that commerce consists only of the buying and selling of tangible commodities is plainly demonstrated. This is established as a general proposition by the cases cited *supra*, pp. 17–19.

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[51] 9 Wheat., at 229–230.

And in *Jordan* v. *Tashiro,* 278 U. S. 123, 127–128, the Court, speaking through the present Chief Justice, reaffirmed the broad definition of "commerce" as follows:[52]

> While in a narrow and restricted sense the terms "commerce," or "commercial," and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise (*Asakura* v. *Seattle, supra*). And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse. (See *Gibbons* v. *Ogden,* 9 Wheat. 1, 189.)

Most closely in point are *Champion* v. *Ames,* 188 U. S. 321 (the *Lottery* case), and *American Medical Association* v. *United States,* 317 U. S. 519.

In the *Lottery* case, the subject of commerce was a lottery ticket, a piece of paper. This paper had value for which persons would pay, because it represented a promise, albeit an illegal one, by the manager of the lottery to pay the ticket holder money if a certain contingency, the

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[52] The question in the case was whether the words "trade" and "commercial" in a treaty applied to a hospital. The Court adopted the same approach as in construing the commerce clause, citing *Gibbons* v. *Ogden.*

drawing of the right number, occurred. The insurance contract, which is embodied in a piece of paper, also has value to the owner because it represents the promise of the company to pay if a certain contingency occurs. Owners of property are willing to pay considerable sums for this promise. The only difference between the two situations is that the insurance contract is issued by a company engaged in a legitimate business enterprise with beneficial social and economic objectives, often for the purpose of protecting the business and commercial interests of the insured, while the lottery ticket represents a pure gamble in an unlawful scheme entirely unconnected with business or commerce. The distinction between a lottery and the insurance business might conceivably lead to the conclusion that the latter was commercial and the former not. But if the lottery ticket is in commerce, as this Court has held, so must be the business of insurance. The unsoundness of any doctrine which would treat the lottery ticket but not the insurance business as in commerce would seem too plain for argument.[53]

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[53] Commentators have regarded the *Lottery* case as inconsistent with the insurance cases. James M. Beck, *The Federal Regulation of Life Insurance*, 181 North American Review 191, 199–200 (1905); S. Huebner, *Federal Supervision and Regulation of Insurance*, 26 Annals, American Academy of Political and Social Sciences, 681, 700–701 (1905); Frederick H. Cooke, *The Commerce Clause of the Federal Constitution*, 13 (1908); cf. 2, W. W. Willoughby, *The Constitutional Law of the United States* (1910 ed.), Sec. 296.

The *American Medical* case involved an enterprise even more closely akin to the insurance business. Members of Group Health Association periodically paid sums fixed by contract, in return for which they were to receive medical service and care when needed. This service was not a commodity; it was even more intangible than the payments of money received by a policyholder from an insurance company. And whether and to what extent the service was to be received depended upon the same type of contingency, *i. e.*, ill health, as is often covered by insurance. Group Health was, therefore, a method of protecting against the risk of undue medical expense through group contributions. The Court held that the Group Health Association was "engaged in business or trade" (317 U. S., at 528) within the meaning of the Sherman Act. "Trade" is probably a narrower term than "commerce," and is unquestionably included within it. (See pp. 44, 49, *infra*.) If a form of group protection which is not tied into the business world to nearly the same extent as is fire insurance constitutes "trade," the business of fire insurance obviously belongs in the same category.[54]

[54] The fact that the *Medical Association* case arose in the District of Columbia and did not involve interstate transactions does not weaken its authority here. For the insurance cases do not hold that insurance is not interstate, as of course it is, but that it is not commerce at all (*New York*

The cases holding that the performance of servicing contracts and the sale of securities are in commerce also are inconsistent with the view that insurance is not commerce. A contract for the servicing of a power company is in substance one performed in large part through the sending of information and documents through the mails. (Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432.) A security is usually either an interest in property which itself often does not move in commerce, or a promise to pay which is as much a personal obligation as an insurance policy. The distribution of such pieces of paper is no more commercial than the insurance business. And yet the offering of an "investment contract" of speculative value and representing an interest in real property has been held to be in commerce within the meaning of the Securities Act. *Securities and Exchange Commis-*

Life Insurance Co. v. *Deer Lodge County*, 231 U. S., at 510). Section 3 of the Sherman Act refers to a "restraint of trade or commerce" in any Territory or the District of Columbia; if an enterprise within these areas constitutes trade or commerce within the meaning of this section, the same activity, when carried on across state lines, is interstate commerce. Compare *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, with *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, 314 U. S. 648, which holds an interstate laundry subject to the National Labor Relations Act. The intimation in the *Atlantic Cleaners* case that "trade" and "commerce" in Section 3 of the Act may have a different meaning than in Sections 1 and 2 cannot be supported.

sion v. *Joiner Leasing Corp.*, No. 24, decided November 22, 1943;[55] see also *United States* v. *General Motors Acceptance Corporation*, 121 F. (2d) 376, 402 (C. C. A. 7), certiorari denied, 314 U. S. 618, in which the court held that financing constituted an essential element in the sale of cars in interstate commerce.

Of special significance is *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19, since it involved insurance itself. The question there was whether a tax on marine insurance policies was a tax on exports prohibited by Article 1, Section 9 of the Constitution. The Court held the tax invalid, on the ground that (p. 26):

> insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis.

The relationship between marine insurance and transportation by sea is not essentially different from that between fire insurance and commerce on land.[56] (See pp. 61–63, *infra*, and *German Al-*

[55] Other cases holding or tacitly assuming that securities are in commerce are *Frost and Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 433; *Securities and Exchange Commission* v. *Universal Service Association*, 106 F. (2d) 232 (C. C. A. 7), and cases cited in the *Joiner* opinion, footnote 10.

[56] Marine insurance has been held to come within the doctrine that insurance is not commerce (*Hooper* v. *California*, 155 U. S. 648).

liance Ins. Co. v. *Kansas*, 233 U. S. 389, 414.) Furthermore, the exportation of goods is itself commerce. If for purposes of a prohibitory constitutional provision insurance is an "integral part" of exportation, it can hardly be said that for regulatory purposes under the commerce clause insurance is neither a part of commerce nor directly related to it.

D. THE MEANING OF "COMMERCE" WHEN THE CONSTITUTION WAS ADOPTED

We have up to this point sought to demonstrate the inconsistency of the language in the insurance cases with other decisions of this Court. In considering whether insurance is commerce in the constitutional sense, however, we may also properly turn to what the framers of the Constitution meant when they used the word "commerce." Did "commerce" to them denote merely the selling of tangible commodities, or their transportation, or did it have a broader meaning? An examination of the usage of the period will demonstrate that at that time "commerce" was a word of widest import.

1. *General usage in the Eighteenth Century*

Thus the Oxford English Dictionary (1893 ed.), relying in large part upon eighteenth century references, notes that "commerce" meant (1) trading and the exchange of merchandise, "including the whole of the transactions, arrange-

ments, etc., therein involved," (2) "intercourse in the affairs of life; dealings," (3) "interchange (esp. of letters, ideas, etc.)," (4) "communication, means of free intercourse." The illustrations given show that the word "commerce" was used to describe all kinds of dealings or intercourse. Dictionaries of the period gave among the synonyms for "commerce," "intercourse," "society," "correspondence," "conversation."[11] As the learned writers who have recently unearthed this material have stated (Walton H. Hamilton and Douglass Adair, *The Power to Govern* (1937), p. 207):

> It is obvious that when Chief Justice Marshall asserted that "Commerce," as written in the Constitution, "undoubtedly is traffic, but it is something more—it is intercourse" (*Gibbons* v. *Ogden*, 9 Wheat. 1), he was not giving an abstract concept a push in the direction his judgment convinced him was desirable. He was merely stating a usage that had been set down in the lexicons for over a century.

And we may add that the more recent decisions of this Court (pp. 17–19, *supra*) holding that all

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[11] Kersey, *Dictionarium Anglo-Britannicum:* Or, *A General English Dictionary* (1708); Martin, *Lingua Britannica Reformata:* Or, *A New Universal English Dictionary* (1754); Johnson, *A Dictionary of the English Language* (1755); Dyche, *A New General English Dictionary* (1761); Barclay, *A Complete and Universal Dictionary* (1774).

dealings between the states, whether or not commercial in the strictest sense, come within the commerce power also have clear justification in the usage of the eighteenth century.

The eighteenth century employed the words "trade," "traffic," and "commerce" to "describe the seamless web of activities by which commodities are fashioned for use, men earn their livings, and nations acquire wealth" (*id.*, p. 53). "Commerce" was the broadest and the most elegant of these terms and was plainly the most suitable for use in a constitution. It included, as we have shown, not only the bartering and selling of wares and all the arrangements pertaining thereto, but also dealings, intercourse, communication, and conversation. It is impossible within the limitations of a brief to give an adequate exposition of the eighteenth century usage of the term.[28] Perhaps, in view of the sweeping and substantially contemporaneous definitions in *Gibbons* v. *Ogden, supra,* pp. 35–36, this is unnecessary. We can do no better than refer in summary to the conclusions of Professor Hamilton and Mr. Adair (pp. 62–63):

> It is all but impossible in our own age to sense fully its eighteenth-century meaning. The Eighteenth Century did not separate by artificial lines aspects of a culture

[28] We respectfully refer the Court to the entire volume written on this subject by Professor Hamilton and Mr. Adair, *The Power to Govern.*

> which are inseparable. It had no lexicon of legalisms extracted from the law reports in which judicial usage lies in a world apart from the ordinary affairs of life. Commerce was then more than we imply now by business or industry. It was a name for the economic order, the domain of political economy, the realm of a comprehensive public policy. It is a word which makes trades, activities and interests an instrument in the culture of a people. If trust was to be reposed in parchment, it was the only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation.

To the eighteenth century, in brief, commerce meant at least the world of business, including industry and finance. This world undoubtedly included insurance.

2. *Usage by members of the Constitutional Convention*

That the framers of the Constitution gave commerce this broad signification, appears from the history of the commerce clause itself. There was no discussion in the Convention as to the meaning of the first two phrases of the commerce clause, which had been approved without dissent or debate. The history of the provision as to the Indians sheds light, however, upon the constitutional usage.

Under the Articles of Confederation Congress possessed the power to "regulat[e] the trade and manage all affairs with the Indians," with certain limitations (Article IX). In order that the new federal government might have the same power, Madison submitted to the Constitutional Convention, to be referred to the Committee on Detail, the power "to regulate *affairs* with the Indians as well within as without the limits of the U. States."[59] [Italics supplied.] This proposition was transmitted to the Committee.[60] The Committee had previously reported, and the Convention approved without discussion, the grant to the federal legislature of power "to regulate commerce with foreign nations, and among the several States."[61] The Committee subsequently recommended that to the commerce clause there should be added the phrase "and with the Indian tribes," and this amendment was adopted without discussion.[62]

It is hardly conceivable that the change in wording from "affairs" to "commerce" was regarded as giving Congress less power to deal with the Indians than had been granted by the inadequate

[59] See Madison's Debates, as reported in H. Doc. No. 398, 69th Cong., 1st Sess., entitled *Documents Illustrative of the Formation of the Union of the American States*, p. 563.

[60] *Ibid.*

[61] *Id.*, at 475, 482.

[62] *Id.*, at 660–661.

Articles of Confederation. Furthermore, the substitution without objection of "commerce" for "affairs," the word suggested by Madison, suggests that the members of the Convention regarded the two words as having a similar meaning, a usage which is in harmony with the dictionary definitions to which we have referred. It thus appears that the Convention intended the commerce clause to reach dealings or affairs of any sort with the Indians or among the several states.

Whether or not "commerce" had this broad a meaning, there can be no doubt that it extends to the affairs of the business world. (See pp. 44–45, *supra*.) That these included the instrumentalities by which business was financed and protected is clear.[43] It is of great significance that members of the Constitutional Convention regarded insurance itself as falling within the commercial field. Alexander Hamilton, in his famous opinion on the constitutionality of the Bank of the United States, rendered February 23, 1791, declared that it would "admit of little if any question" that the power to regulate commerce included "The Regulation of policies of insurance."[44] James Wilson, a

[43] Dictionaries of the time distinguished a "bank of earth" from a "bank, in commerce." (See Hamilton & Adair, *loc. cit., supra*, p. 208.)

[44] See 3 *Works of Alexander Hamilton* (Lodge ed.), pp. 202–203.

member of the Convention and subsequently of this Court, in writing of the law merchant, declared, "This system of law has been admitted to decide controversies concerning bills of exchange, policies of insurance, and other mercantile transactions, both where citizens of different states, and where citizens of the same state only, have been interested in the event."[45] And the opinions in *Gibbons* v. *Ogden*, from which we have already quoted (*supra*, pp. 35–36), were written by contemporaries of the framers of the Constitution who used language in the same sense.

E. THE PRESENT MEANING OF COMMERCE

We believe that we have demonstrated that the domain of commerce, during the Constitutional period, was understood to be at least that of the business or mercantile world.[46] The opinions of this Court adopt the same view. The meaning of commerce is "determinable by the usages of the commercial world" (*Bowman* v. *Chicago & N. W. Railway Co.*, 125 U. S. 465, 501). "Commerce among the states is not a technical legal conception, but a practical one, drawn from

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[45] I *The Works of James Wilson* (Edited by James DeWitt Andrews), 1896, p. 335.

[46] That "commerce" refers to the entire business and financial community is indicated by many of its usages even at the present time. The phrases "commercial geography," "commercialize" and "commercial law" speak with overtones which embrace the whole industrial and financial economy.

the course of business" (*Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Stafford* v. *Wallace*, 258 U. S. 495. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, 122). "For more than a century it has been judicially recognized that in a broad sense it [commerce] embraces every phase of commercial *and business* activity and intercourse." [Italics supplied.] *Jordan* v. *Tashiro*, 278 U. S. 123, 127–128. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 436, quotes with approval Mr. Justice Story's definition of "trade":"

> • • • In the first place, the word "trade" is often and, indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade. • • •

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[11] *The Schooner Nymph*, 18 Fed. Cas. No. 10388. The term "trade," which is employed in the Sherman Act along with "commerce," is either synonymous with or narrower than "commerce." This was recognized in many early Sherman Act cases (*United States* v. *Patterson*, 55 Fed. 605, 639 (C. C. D. Mass.); *In re Grand Jury*, 62 Fed. 840, 841 (N. D. Cal.); *United States* v. *Debs*, 64 Fed. 724, 749 (C. C. N. D. Ill.); *United States* v. *Cassidy*, 67 Fed. 698, 705 (N. D. Cal.); *United States* v. *Coal Dealers' Assn.*, 85 Fed. 252, 265 (N. D. Cal.); see, also, *State of California* v. *Tagami*, 195 Cal. 522, 528–529; *Spence* v. *Johnston*, 142 Ga. 267, 271. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189).

In the *Thames & Mersey* case, quoted *supra*, p. 41, the words "commerce" and "business" are used interchangeably in the same sentence.

The usage of recent years, as well as that of the past, shows that insurance is a part of the business, and hence the commercial, world. This appears not only from the understanding manifested outside the United States Reports, but also from the vocabulary of this Court in other cases than those following *Paul* v. *Virginia*.

1. *The usage in the business and legal worlds generally*

In 1905 the Chairman of the Committee on Insurance Law of the American Bar Association, in answer to inquiries, received letters setting forth English views of the subject from the distinguished jurist, Sir Frederick Pollock, and Mr. Charles Mylne Barker, President of the Incorporated Law Society of London.[68] Their replies are most pertinent. Sir Frederick's letter stated:

> In answer to your question of October 26th, marine insurance has undoubtedly always been held for part of the law merchant. (See *Malines Lex Mercatoria*, part I, chaps. 24, 25.) And this being so, it would seem difficult to maintain that other kinds of insurance are not, for it is com-

[68] American Bar Association Committee on Insurance Law, Report (1906), 29 *American Bar Association Reports*, 558.

> mon learning in our modern law that the same general principles govern them all. "Commerce" is not a word of art in common law nor frequent in English statutes, and I do not know of any judicial interpretation of it in English jurisdiction. It would seem, however, to include at all events the subject matters of the law merchant.

Mr. Barker's letter reviewed the pertinent English experience and usage, and concluded:

> I think, therefore, that in England from the time of Elizabeth to the present day insurance has been regarded as a branch of commerce.

The report of the Bar Association Committee [69] also states the results of a questionnaire sent in 1905 by Senator Dryden (President of the Prudential Insurance Company) "to some eight thousand associations and individuals throughout the United States. Included in this number was the entire membership of the American Bar Association." 71.1 percent of the replies answered in the affirmative the question:

> As a matter of personal opinion, do you hold the business of insurance to be commerce, or an integral and indispensable element of commerce, in the sense in which this term is used in everyday language?

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[69] *Id.*, at 550.

We think it of considerable significance that thirty-seven years after this Court's first pronouncement on the subject, a large majority of those polled were willing to state that the Court's reasoning was contrary "to the sense in which 'commerce' is used in everyday language." On the basis of this and a great deal of other historical material, the Committee of the Bar Association concluded that "*Paul* vs. *Virginia,* and the cases based upon it, involve a fundamental error in their repudiation of the usage and practice of the commercial world," and that "History and universal usage therefore sustain the claim that insurance is commerce." [70]

Many other commentators were of the same opinion.[71] We shall quote only from a few.

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[70] *Id.*, at 557.

[71] The expressions critical of this Court's reasoning in the insurance cases are well epitomized in two statements, one written in 1905 and one in 1932. In *Federal Control of Insurance*, 39 American Law Review 182 (1905), Professor Maxey, of the West Virginia University Law Department, aptly stated:

"* * * Practically every man who thinks of the insurance business as it exists today, thinks of it as one form of commercial activity, thinks of its relations as commercial relations. This is true of the jurist as well as the business man, unless, perchance, the former has read *Paul* v. *Virginia*."

And Professor Bernard C. Gavit commented in *The Commerce Clause of the United States Constitution* (1932), p. 134:

"* * * The expression 'Insurance is not commerce' has become almost a classic. There is nothing more to be said for it."

See also, in addition to the authorities cited in the text: George F. Seward, President, The Fidelity and Casualty

Senator Dryden, in an address in which he re-

Company of New York, *Insurance is Commerce* (1910); James M. Beck, *The Federal Regulation of Life Insurance*, 181 No. Am. Rev. (1905) 191; Reginald H. Innes (in 1900, of the Eng. Bar; 1935–40, Ch. Judge in Equity in New South Wales), *Insurance in its Relation to the Commerce Clause of the Federal Constitution*, 48 American Law Register, 717 (1900); Representative W. P. Hepburn, in *Organization and Law of the Department of Commerce and Labor*, Washington, D. C. (1904), 579; Henry E. Hess, Manager, New York Fire Insurance Exchange, *An Argument for Insurance as Commerce and for National Supervision*, paper read before Insurance Section of International Congress of Arts and Sciences, St. Louis, Mo., Sept. 19–25, 1904; A. J. Vorys, President, National Association of State Insurance Commissioners, see Max Cohen, *New Conditions Demand New Remedies*, 1 Moody's Magazine (1905–06), 302 n.; Sylvester C. Dunham, President, Travelers Insurance Co., *Amend the Constitution, if Necessary to Obtain Supervision*, 1 Moody's Magazine (1905–06), 291, 293; Nat Tyler, *Federal Supervision in Interest of Policyholders*, 1 Moody's Magazine (1905–06), 305, 307; David K. Watson, *The Constitution of the United States* (1910), 520, 521; Walter H. Bennett, Secretary-Counsel of National Association of Insurance Agents, 300 Weekly Underwriter (1934), 27, The Eastern Underwriter, Sept. 28, 1934, 20, 24; John W. Walsh, *National Supervision of Insurance and Paul* v. *Virginia*, 38 American Law Review (1904), 181, 187, *National Regulation of Insurance*, 30 National Corporation Reporter (1905), 434–435; R. A. M'Curdy, 27 Insurance News (1905), 4; Darwin P. Kingsley, President, New York Life Insurance Company, *Insurance Supervision and National Ideals*, 189 North American Review (1909) 481, 492–496; G. F. Michelbacher, *Casualty Insurance Principles*, 2nd ed. (1942) 121–122; L. G. Fouse, President, Fidelity Mutual Life Insurance Co., *State Regulation of Insurance*, 24 Annals, American Academy of Political and Social Sciences (1904) 69, 70, 80–82.

viewed earlier authorities on the subject,[72] concluded:

> * * * I believe all America today understands the word "commerce" to comprehend insurance * * *.

Henry Evans, President of the Continental Insurance Company, the Fidelity-Phoenix Fire Insurance Company, and the American Eagle Fire Insurance Company (all appellees here), testified on marine insurance before a House Subcommittee (Hearings, House Subcommittee on the Merchant Marine and Fisheries (66th Cong., 1st Sess., 1919), p. 283), as follows:

> Mr. EVANS. I think insurance is commerce.
>
> Mr. HEDGE. In spite of the Supreme Court?
>
> Mr. EVANS. The Supreme Court has ruled the other way. But today a cotton buyer

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Contra: William R. Vance, *Federal Control of Insurance Corporations*, 17 Green Bag (1905), 89; Harold C. Havighurst, 143 Weekly Underwriter (1940) 1485; George J. Benson, *Federal Control of Insurance*, 6 The Brief (1906) 116, 121–122; Arthur P. Will, *Federal Regulation of Insurance*, 66 Central Law Journal (1908) 49, 53, 54, 55; Samuel Bosworth Smith, *Shall We Have State or Federal Supervision?*, 13 The American Lawyer (1905) 372, 374, 376; Carman F. Randolph, *Federal Supervision of Insurance*, 5 Columbia Law Review (1905) 500, 513–516, 517; S. F. Wolfe, *State Supervision of Insurance Companies*, 26 Annals, American Academy of Political and Social Sciences (1905), 146–152.

[72] Address delivered before the Boston Life Underwriters Association on November 22, 1904, entitled *The Regulation of Insurance by Congress.*

> in Texas, for instance, a part of his contract is to deliver his cotton in Liverpool, and to cover the insurance. Now, the insurance is a part of that contract, and I believe if the matter came before the Supreme Court, if you could properly frame up such a case, that they would change their ruling.

The statements of many other insurance executives can be cited to the same effect.[73] These views have not been limited, however, to persons associated with insurance companies, whose opinions might be deemed colored by their distaste for burdensome state regulations.

Miles M. Dawson, Actuary, New York Legislative Committee, stated in an article entitled "A Case for National Supervision," 1 Moody's Magazine (1905–1906) 312, 314:

> The fact now appears to be that insurance is one of the most important commercial enterprises in the world, and a more vital part of the commercial structure than many other handmaids of commerce which might be mentioned that have received recognition long ago.

S. S. Huebner, Instructor of Insurance and Commerce, University of Pennsylvania, and later an expert in insurance to the U. S. Shipping Board and the Committee on the Merchant Ma-

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[73] See Seward, Hess, Dunham, Bennett, Kingsley, and Fouse, cited in note 71, *supra*.

rine and Fisheries, stated in his article *Federal Supervision and Regulation of Insurance,* 26 Annals, American Academy of Political and Social Sciences (1905), 681, 701, 703:

> It requires little argument to prove that insurance fundamentally underlies all business, and that it is inseparably interwoven with our whole commercial life. * * * in the case of fire insurance, the usefulness of the business to trade and industry can scarcely be comprehended. * * *
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> * * * * * *
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> In general, then, insurance in its various forms turns out to be the foundation of credit, and the protector of all commerce, rather than the mere incident of commerce that the Supreme Court has declared it to be.

In his treatise *The Commerce Clause of the United States Constitution* (1932) Professor Bernard C. Gavit wrote (pp. 333–334):

> "Commerce" includes more even than "business." The insurance business is certainly "commerce." * * *

In an excellent article on the effect of the commerce clause in the absence of federal legislation (Shenton, *Interstate Commerce During the Silence of Congress,* 23 Dickinson Law Review 78, 107, 139 (1918–1919),[74] the author comments upon the holdings in *Nathan* v. *Louisiana,* 8 How. 73, and

[74] The article is reprinted in 3 Selected Essays on Constitutional Law (Association of American Law Schools), 840, 865.

the insurance cases that buying and selling bills of exchange and issuing policies of insurance are not commerce. These decisions, he states—

> * * * ring strangely. The fact is that dealing in bills of exchange and issuing policies of insurance are commonly understood to be commercial pursuits. The uniform law which codifies the law of bills and notes throughout most of the country is known as one of the Uniform Commercial Acts. * * * Life insurance and fire insurance on a house are perhaps not so clearly commerce as the insurance of a marine cargo, yet every insurance contract contemplates the transmission of a policy and money, a transmission which is quite frequently from one state to another. A broker who dealt in foreign bills of exchange was said not to be engaged in commerce, but in "supplying an instrument of commerce." Why should the business of supplying the instruments of commerce be beyond the reach of a power to regulate commerce? * * *

In 1908, in a treatise on *The Commerce Clause of the Federal Constitution,* Frederick H. Cooke declared that (p. 13):

> Contracts of insurance between persons situate at the time in different states * * * seem literally "intercourse," and it seems difficult to discover any satisfactory reason for excluding such con-

tracts from the operation of the commerce clause.[75]

2. *The usage of this Court*

Except in cases in which it was concerned with the argument that state taxes on and regulations of insurance contravened the commerce clause, this Court has referred to insurance in a way which indicates clearly that it is regarded as a part of commerce.

In the first place the Court has almost invariably referred to the activities of insurance companies as "business." (E. g., *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 316; *German Al-*

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[75] A practical recognition of the integration of insurance with commerce in ordinary understanding may be found in the practice of "Chambers of Commerce." Such Chambers, as is well known, include within their membership insurance men and bankers along with other business men. The United States Chamber of Commerce, for example, has a Department of Insurance, and its board of directors includes a substantial number of insurance executives. See the pamphlet issued by the Chamber of Commerce entitled *The Chamber of Commerce of the United States—Its Organization, Functions and Services* (June 27, 1938), and the annual pamphlets published by the Chamber of Commerce of the United States in Washington entitled *Who's Who on the Board*. The latter pamphlet for the year 1942–1943 states in its introduction (p. 1):

> *Nine major divisions of business* are represented in the Board: Agriculture, Construction and Civil Development, Domestic Distribution, Finance, Foreign Commerce, *Insurance*, Manufacture, Natural Resources, and Transportation and Communication. [Italics supplied.]

See to the same effect the pamphlet for 1941–1942, p. 1.

liance Ins. Co. v. *Kansas*, 233 U. S. 389; *La Tourette* v. *McMaster*, 248 U. S. 465; *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257; *Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313.) Indeed in the *Osborn* case (p. 66) the Court spoke of insurance as a type of business activity along with "warehouses, flour mills, and other business ventures," or the "business of banking," which are all unquestionably commercial. Inasmuch as the modern concept of "business" is included within the constitutional term "commerce" (pp. 44–45, 48–50, *supra*), the Court's inability to refer to insurance as anything but a business is itself a recognition of its commercial nature.

Moreover, there are cases in which the Court has described the insurance business as "commercial intercourse" and "trade."[76] *Insurance Co.* v. *Davis*, 95 U. S. 425, 429, related to the effect of an offer to pay premiums to a Southern agent of a New York insurance company during the Civil War. The premise upon which the Court predicated its discussion was "that war suspends all *commercial intercourse* between the citizens of two belligerent countries or states" [italics supplied]—a proposition which was assumed without question to apply to the payment

[76] The opinion of the Supreme Court of Kansas in *In re Pinckney*, 47 Kans. 89, 91–92, 27 Pac. 179 (1891), contains an enlightening discussion on this point.

of insurance premiums. The suspension of "intercourse" was said to prevent "any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other." This description of the ordinary supervisory and reporting activities of the insurance business as intercourse brings them within Marshall's classical definition of commerce."

In *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 409, the Court was concerned with the validity under the Fourteenth Amendment of an Iowa statute prohibiting fire-insurance companies from combining or agreeing upon insurance rates. Without noting any difference between insurance and other types of business, the Court upheld the law on the authority of cases sustaining statutes "prohibiting combinations between possible rivals in trade."

In *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19, discussed *supra*, p. 41, the Court declared that insurance was an integral part of exportation, which is itself commerce.

F. FIRE INSURANCE FALLS WITHIN THE FEDERAL COMMERCE POWER BECAUSE OF ITS EFFECT UPON INTERSTATE INDUSTRIES

We have sought to show that federal regulation of the fire insurance business is constitu-

[11] The indictment alleges that the appellees engaged in these activities (R. 9–10).

tional because the business as presently carried on is both commerce and interstate commerce. Even if this were not so, however, regulation of the business under the commerce clause would be lawful because of the close economic relation between fire insurance and activities which are unquestionably interstate.

The indictment alleges that (R. 9) "fire insurance coverage is essential to and directly affects the flow of interstate commerce." If we substitute "business" for commerce in the quoted sentence, this is substantially what this Court recognized in the *German Alliance* case when it said (233 U. S., at 414) that fire insurance "is practically a necessity to business activity and enterprise". (Cf. *Thames & Mersey Insurance Co.* v. *United States, supra*, p. 41.) This relationship is described in more detail in many authoritative sources.[78] It seems sufficient here to quote from one of them. The Report of the

[78] Francis C. Moore, *Fire Insurance and How to Build* (1903), 20; S. S. Huebner, *Property Insurance* (1922), 10–12; 14; R. F. Van Vranken, 36 Eastern Underwriter (1935) 23; Darwin P. Kingsley, *Insurance Supervision and National Ideals*, 189 North American Review (1909) 481; Robert Riegel and H. J. Loman, *Insurance Principles and Practices* (1929), 9; F. E. Wolfe, *Principles of Property Insurance* (1930), 2, 6–7; Albert H. Mowbray, *Insurance, Its Theory and Practice in the United States* (1937), 26, 27; W. F. Gephart, *Principles of Insurance*, Volume II: *Fire* (1917), 35–36; L. G. Fouse, *State Regulation of Insurance*, 24 Annals, American Academy of Political and Social Sciences (1904), 80–82.

American Bar Association Committee on Insurance Law entitled "Is Insurance Interstate Commerce?" states (28 American Bar Association Reports (1905) 498, 502–504):

> The development of the business of insurance has been concurrent and co-extensive with the development and expansion of all commerce, * * * * * * but for the system of insurance which has been developed within the last hundred years, commerce as we know it, credit as it is, civilization as we live it, would not have been possible.
>
> Fire insurance serves as a basis of credit. It is, in fact, collateral. None of the great manufacturing or commercial enterprises could be carried on in their present magnitude except for the confidence based upon insurance. The merchant desiring a line of credit from a manufacturer or wholesale dealer in a distant city is required to assure his creditor that the merchandise will be insured, not only while in transit, but after it has reached its destination. Insurance is a recognized asset, and the credit system of the country rests upon it as much as upon the financial responsibility of men and mercantile corporations. Bankers require their borrowers to carry fire insurance. * * *
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> * * * * * *

Hon. Wm. P. Hepburn, chairman of the House Committee on Interstate and For-

eign Commerce, at the hearing before that committee (p. 174) upon the bill which established the Department of Commerce and Labor, said:

"The power to insure a cargo or a vessel lessens the hazards of trade, and it has become so much the custom to rely upon that that it would undoubtedly be a wonderful impairment to the possibilities of commerce if the inability of men to insure should become a fixed fact; men would not undertake ventures that they now do if that were so."

In the debate on the same bill in Congress, January 17, 1903, Mr. Hepburn said: "* * * Now, it has come to pass that all commercial business is in a large measure dependent upon insurance. As I said the other day, if you were to obliterate the insurance of the United States you would well nigh obliterate the commerce of the United States. The business of commerce could not be undertaken were it not for the protection and influence of insurance." (Department of Commerce and Labor: Organization and Law, p. 589.)

Inasmuch as these facts are both alleged in the indictment and have been previously judicially noticed, further amplification seems unnecessary. In so far as the power of Congress is concerned, the relationship of fire insurance to interstate commerce does not differ materially from that of

bills of lading" as described by this Court in *United States* v. *Ferger*, 250 U. S. 199, 204–205, as follows:

> That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof.

The Court there sustained the federal power to punish those who forged interstate bills of lading because of the effect of spurious bills upon "the credit and confidence which sustains interstate commerce" (p. 205). The credit which sustains the flow of goods in interstate commerce is also, as has been demonstrated, dependent upon fire insurance. A producer or shipper who could not obtain insurance would be unable to secure the credit on which the life of his business depends.

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[19] *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19, held that an insurance policy was as essential to exportation as a bill of lading.

The reasoning of *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 626 (C. C. A. 9th), certiorari denied, 318 U. S. 791, 792, with respect to banks also applies to fire insurance:

> The nature and extent of the facilities afforded by a banking institution of the size and spread of respondent are too well known to warrant further exploration of the findings. That respondent's activities lend vital support to the commercial life of the nation is of course beyond debate. The impact upon commerce of the partial or complete cessation of its banking operations would be felt immediately throughout the country, and indeed the world. Shipments of merchandise and manufactured wares covered by bills drawn for the acceptance of respondent would be halted; and similar results would follow upon a cessation of its other credit activities. It is immaterial that substitute service might be obtained elsewhere, *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 326, 60 S. Ct. 918, 84 L. Ed. 1226. The dependence of commerce upon the continuity of credit furnished by these great banking institutions is as marked as was its dependence upon the electric energy furnished by the intrastate utilities involved in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126. While credit services, considered as

aids to commerce, may be less tangible than is electric current, for present purposes the differences would appear to be immaterial.

That Congress has the power under the commerce clause to regulate any instrumentality so essential to commerce cannot be doubted.[80] Congress thus has authority to see that the persons engaged in interstate commerce who need fire insurance are not deprived of and are not required to pay excessive amounts for it.

An appropriate means of attaining this legitimate federal objective is to prevent combinations of insurance companies from refusing to furnish insurance to persons who failed to deal with them exclusively, or from agreeing to eliminate all rate competition. This is the conduct with which appellees are charged—and it is precisely the type of conduct which the Sherman Act has been held to forbid when interstate commerce is restrained or monopolized, irrespective of whether the defendants are themselves engaged in such commerce. (E. g., *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Patten*, 226 U. S. 525; *Swift & Co.* v. *United States*, 196 U. S. 375; *Coronado Coal Co.* v. *United Mine Workers*,

[80] See in addition to the cases cited in the text, *United States* v. *General Motors Acceptance Corporation*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618 (holding subject to the Sherman Act a restraint upon automobile financing); *United States* v. *Patten*, 226 U. S. 525; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. For general principles see *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, 317 U. S. 111.

268 U. S. 295; *Local 167* v. *United States*, 291 U. S. 293; *United States* v. *General Motors Acceptance Corporation*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 484–485; see *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120.).

We think it clear that the federal government possesses the power to prohibit the activities complained of here. In Point II, immediately following, we shall show that in the Sherman Act it has exercised this power.

G. THE INSURANCE INDUSTRY SHOULD BE SUBJECT TO FEDERAL REGULATORY POWER

The problem as to federal power over the insurance business may be approached more broadly. The record confirms what is commonly known, that the insurance business is a great national industry in every sense of the word. The individual companies operate in a great many States. Moreover, local organizations having been found inadequate,[81] the fire insurance companies have themselves united in national [82] and large re-

[81] A. F. Dean, *The Philosophy of Fire Insurance* (Chicago, 1925), Vol. I, 23; William Hamlin Wandel, *The Control of Competition in Fire Insurance* (1925), ch. 3; Prentiss B. Reed, *Fire Insurance Underwriting* (New York, 1940), 352–353.

[82] *E. g.*, the Interstate Underwriters Board; the National Board of Fire Underwriters. The companies belonging to these associations are listed in *Best's Insurance Reports—Fire and Marine*, 1942, pp. 1082–1085.

gional associations,"[83] not merely for informational and social purposes but in order to control and dominate the activities of the industry.[84] The premium income in the United States in 1941 of the appellees alone was $886,764,876, of which $109,721,309 was derived from the home state.[85] The premium income of life insurance companies in 1941 amounted to four billion dollars, and the total assets of such companies were nearly 33 billion dollars.[86] The operations of these companies are carried out almost entirely through the channels of interstate commerce. Each company has a central office from which it supervises its manifold activities, and to and from which flow the vast sums with which business is carried on.

Argument should not be necessary to show that a nation-wide industry of this magnitude, operating across state lines, falls within the scope of the national commerce power. Indeed, from the time of Marshall, this Court has recognized that the fundamental purpose of the commerce clause was to permit regulation by the national authority of the "commerce which concerns more states than

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[83] The country is divided into four regions, the Eastern, Southeastern, Western, and Pacific, each of which has its controlling association. Membership in these associations is shown in *Best's Insurance Reports, loc. cit. supra.*

[84] *E. g.*, activities of the Southeastern Underwriters Association described in the indictment.

[85] See the table printed in Appendix, *infra*, compiled from *Best's Insurance Reports.*

[86] *Statistical Abstract of the United States*, 1942, p. 337.

one * * * and [of] those internal concerns which affect the states generally." Indisputably, this characterization fits the insurance industry.[87]

II

The Insurance Business Is Subject to the Sherman Act

The Sherman Act forbids "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States" (Section 1), and any attempt to monopolize any part of such "trade or commerce" (Section 2). The indictment alleges restraints of the types commonly held to violate the Act—price-fixing, boycotts of agents and persons refusing to deal exclusively with the appellees, and monopolization. In Point I we have argued that the insurance business conducted by appellees is itself interstate commerce in the constitutional sense. If this is so, appellees' conduct comes within the

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[87] *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195. The quoted passage from *Gibbons* v. *Ogden* was repeated or restated in *Mayor of New York* v. *Miln*, 11 Pet. 102, 146, in 1837; *The Daniel Ball*, 10 Wall. 557, 564, in 1870; *Kidd* v. *Pearson*, 128 U. S. 1, 17, in 1888; *Champion* v. *Ames*, 188 U. S. 321, 346, in 1903; the *Employers' Liability Cases*, 207 U. S. 463, 493, 507, in 1908; and *The Minnesota Rate Cases*, 230 U. S. 352, 398, in 1913. Although "differences have arisen in" the application of these principles "to the complicated affairs" of the nation, they have "never [been] doubted" and universally approved" (*Employers' Liability Cases*, *supra*, Mr. Justice Moody dissenting, at 507).

Sherman Act unless "commerce," as used in that statute, was intended to have a narrower meaning than in the Constitution. We have also shown that fire insurance is vitally related to transactions in other industries which are unquestionably interstate commerce, and that the activities charged to appellees would restrain such commerce. (See pp. 60–67, *supra*.) If this conclusion is correct, appellees' conduct comes within the Sherman Act unless a special exception is to be read into it for restraints caused by insurance companies.

A. THE LANGUAGE OF THE ACT

The conduct charged to appellees is undoubtedly a restraint upon the business of selling fire insurance. If the operations of the fire insurance companies are commerce,[88] as shown in Point I, the facts alleged fall within the terms of the Sherman Act.

In *American Medical Association* v. *United States*, 317 U. S. 519, the Court held that a cooperative activity providing medical service and hospitalization on a "risk-sharing basis" was a business or trade within the meaning of the Act. The enterprise involved, in substance insured its members against the costs of illness or injury.

[88] It has not been argued that if appellees are engaged in trade or commerce, the trade or commerce would not be "among the several states."

If such an enterprise is engaged in trade or commerce, the same must be true of a company operated for profit and engaged in the business of insuring others, including concerns and persons engaged in trade and commerce, against the danger of loss by fire.

We thus think it clear that the literal language of the Sherman Act reaches restraints upon the insurance business. The words of the statute should, of course, be given their natural effect unless it is definitely shown that Congress intended them to carry a different meaning.

B. THE WORDS "TRADE OR COMMERCE," AS USED IN THE SHERMAN ACT, WERE NOT INTENDED TO HAVE A NARROWER MEANING THAN IN THE CONSTITUTION

1. The words of the Constitution are "commerce among the several states." The language of the Sherman Act is the same, supplemented by the word "trade." This identity was, of course, not fortuitous. It is obvious on the face of the Act that Congress employed the constitutional phrase in order that the jurisdiction to be exercised under the Sherman Act would be coextensive with that open to the Federal government under the Constitution with respect to the types of restraint at which the Act was directed. Different language would have been employed if Congress had had a more limited intention.

This Court has stated explicitly that, in the "sense of preventing restraints on commercial

competition," Congress in the Sherman Act "exercised all the power it possessed" (*Apex Hoisery Co.* v. *Leader*, 310 U. S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435).[*] And the many antitrust cases in which this Court has treated the question of jurisdiction under the Act as identical with the constitutional issue bear witness to a consistent assumption that Act and Constitution have the same scope. (E. g. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Corp.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Patten*, 226 U. S. 525; *Coronado Coal* v. *United Mine Workers*, 268 U. S. 295; *Local 167* v. *United States*, 291 U. S. 293.) Indeed, when the validity of other statutes has been called into question, the Court has relied upon the antitrust cases as constitutional authorities (*National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 38–40; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120; *Wickard* v. *Filburn*, 317 U. S. 111, 122–123; *Stafford* v. *Wallace*, 258 U. S. 495, 517–518; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35, 39).

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[*] In the early case of *United States* v. *Debs*, 64 Fed. 724, 749 (C. C. N. D. Ill.), Circuit Judge Woods stated: "The word 'commerce,' as used in this statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the constitution."

The Court's treatment of the Sherman Act as going to the limits of the commerce power is fully supported by the Act's legislative history. The well-known objects of the law were to eliminate the "trusts" and "'combinations' of businesses *and of capital* organized and directed to control of the market by suppression of competition in the marketing of goods *and services,* the monopolistic tendency of which had become a matter of public concern." [Italics supplied.] *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 492–493. The Act prohibited *every* restraint on competition, adding the words "or commerce among the several states" as (*id.* p. 495) "the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, * * * so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce." It was not suggested that any combinations which could be reached under the commerce power were not to be; Congress was in no mood to temporize with monopoly of any sort.

Senator Sherman, in explaining his original bill on March 21, 1890,[86] declared that its purpose was (21 Cong. Rec. 2457):

[86] The bill finally passed was not Senator Sherman's but one largely drafted by Senator Edmunds, and explained to the Senate and House by him and by Representative Culberson, respectively, who are quoted in the text. (See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 489, and authorities

> to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. * * *

On April 8, after the Senate Judiciary Committee had submitted the bill in substantially its present form, Senator George, who was one of its draftsmen,[21] stated (21 Cong. Rec. 3147):

> The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress.

Representative Culberson, who was in charge of the bill in the House, stated on May 1, 1890 (21 Cong. Rec. 4091):

> Now, it is suggested that Congress ought to go further. It is very difficult to say how it could do so. It occupies now in this bill, or attempts to occupy, the sphere allotted to it in the regulation of commerce between the States. * * *

On June 11, the House Conferees submitted a report in which they stated (21 Cong. Rec. 5950):

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cited.) But although the original bill differed greatly from that finally passed, there was no difference in ultimate objectives or in the intention to use all of the constitutional power available.

[21] See Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 North American Review 801, 802 (1911).

> In the original bill [which was the one finally passed] two things were declared illegal: Contracts in restraint of interstate trade or commerce, and the monopolization of such trade.
>
> Its only object was the control of trusts, so called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

On June 16, in discussing an amendment (which did not pass) proposed by the House, Senator Edmunds, who had reported the final bill out of the Judiciary Committee, stated (21 Cong. Rec. 6116):

> I think myself that this amendment of the House was wholly unnecessary, but the original bill as it passed the Senate was adequate to cover every case over which Congress had power, and broad enough to include every case of wrongdoing of any kind of that nature. * * *

On June 20, 1890, on the occasion of the final conference report to the House immediately prior to the passage of the present act, Representative Kerr of Iowa stated (21 Cong. Rec. 6313):[32]

> When this bill was before the House recently the gentleman from Texas [Mr. Culberson], in discussing its provisions, made the statement that the power given in this bill was an exercise of the entire power of

[32] See also the statement of Representative Enloe on the same page.

> the General Government over the subject of trusts, and that its provisions presented the matter in a shape to obtain the decisions of the courts, out of which we might gather the full extent of the power of the Government on that subject. • • •
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> • • • • • •
>
> My opinion is that it will be the exercise of the entire power of the Government over the subject, except insofar as it applies to the Territories and the District of Columbia.

On the same day, the last speech on the floor of the House, immediately preceding the unanimous adoption of the bill by the House, was made by Representative Stewart, of Vermont. He said (21 Cong. Rec. 6314):

> • • • The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States. • • •

2. It is clear, furthermore, not only that Congress intended the Sherman Act to exercise all of its commerce power over the subject regulated, but that it did not regard the terms of the Act as having an exact and unalterable significance. "• • • the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions" (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359–360;

ugar Institute v. *United States*, 297 U. S. 533, 00; cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S., t p. 489.) Senator Edmunds stated in the Sen- te that the Committee intended to (21 Cong. ec. 3148)):

> • • • leave it to the courts in the first instance to say how far they would carry it or its definitions as applicable to each particular case as it might arise.

n describing the work of the Committee in an rticle written some years later, he declared—[93]

> • • • after most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words *"trade" and "commerce"* or "trust," or the words "restraint" or "monopolize," by precise and all-inclusive definitions; and that these were truly matters for judicial consideration. [Italics supplied.]

. is to be noted that the jurisdictional terms rade" and "commerce" were among those de- berately left undefined. Other members of each use also showed their awareness that the pro- sed legislation was a mere statement of prin-

[93] Edmunds, *The Interstate Trust and Commerce Act of* , 194 North American Review 801, 813, quoted with ap- roval in the *Apex* case, 310 U. S., at 489.

ciple from which the courts would determine the scope of the Act."

"Senator Sherman said (21 Cong. Rec. 2460):

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as law makers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. * * *"

Senator Turpie declared (21 Cong. Rec. 2556):

"I apprehend there are very few of us of this generation who have the slightest conception what this domain, very extensive in its character, shall yet include or embrace. Congress has seen fit heretofore to enter this domain very partially, only upon one or two or at the most three lines, and then to go no very great distance. The progress made in it has been always and must be dual. The jurisdiction conferred on the United States courts, arising under the Constitution and laws of the United States, is not self-operative. It always requires the act of Congress in the first place and the judgment of the court in the second place to make any progress at all in that domain. Congress must take the initiative. We must take action upon the subject-matter, and *if our own jurisdiction in respect to such subject-matter is sustained by the courts the judicial jurisdiction in the courts is then sustained in respect to such subject-matter* and the methods by which it is to be adjudicated." [Italics supplied.]

Representative Cannon of Illinois stated (21 Cong. Rec. 4099):

"Gentlemen say that they do not know how the courts will construe the act. It is for us to enact the law and for courts to construe and enforce it. If we do our duty it is reasonable to believe that the co-ordinate branch of the Government will do its duty. * * * *"

Representative Kerr, in his explanation of the Act just before it was passed, said (21 Cong. Rec. 6313):

"* * * The gentleman from Texas [Mr. Culberson] very truly said that this was an unexplored field, that this

Inasmuch as Congress intended the Court to determine the meaning of "trade" and "commerce," in an act whose "adaptability" was "comparable to that found to be desirable in constitutional provisions," it seems plain that Congress was not as a matter of legislative intention attempting to bind the Court to the tenets of its prior decisions, or to deprive it in this field alone of its frequently exercised privilege of changing its mind.[95]

Appellees argue, however, that the Court had, before 1890, declared that insurance was not commerce, and that the application of the Sherman Act must be regarded as frozen in the 1890 judicial mold. They refer, in particular, to the first portion of a statement by Senator Turpie in the debate on the Sherman Act. A fuller quotation

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was new legislation, that it was a case which demanded that the Government should declare the law, and that out of that declaration of the law would be evolved the decisions of the court, which would settle the question and determine the extent of our control over the subject. When the gentleman from Texas made that statement he had the approval, I believe, of every gentleman on this side of the House, and also of a number of gentlemen on the other side."

[95] See *Burnet* v. *Coronado Oil Co.*, 285 U. S. 393, 406–410 (dissent). As Mr. Justice Field, the author of *Paul* v. *Virginia*, himself stated (*Barden* v. *Northern Pacific R. Co.*, 154 U. S. 288, 322): "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

is illuminating. The Senator said (21 Cong. Rec. 2556–2557):

> The Senator from Missouri [Mr. Vest] spoke the other day about the difficulty of defining the word "commerce," especially as contained in the phrase "interstate commerce." I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce, and I suppose by following the circle of negations long enough and excluding all the things not commerce we should come at last to the residuum, which must be commerce or interstate commerce, because it can be nothing else. *A fortiori*, judging from this principle, I should myself have decided that transportation is not commerce nor interstate commerce either. * * *

It appears that the Senator was aware of this Court's insurance decisions, but thought their reasoning equally applicable to show that transportation was not commerce. Such a grudging and critical recognition is far from a statement that Congress intended that the Sherman Act not reach insurance monopolies even if this Court should alter its views.

3. Our position that the Sherman Act left the courts with freedom to exercise their usual prerogative in determining whether or not to adhere to prior decisions is confirmed by the analogy of

cases concerning manufacturing. This Court had, prior to 1890, declared that manufacturing or production, like insurance, was not commerce or subject to the federal commerce power (*Veazie* v. *Moor,* 14 How. 568 (1852); *Lord* v. *Steamship Co.,* 102 U. S. 541 (1880); *Coe* v. *Errol,* 116 U. S. 517 (1886); *Kidd* v. *Pearson,* 128 U. S. 1 (1888).) The debates on the Sherman Act show that Congress was very conscious of these decisions, and particularly of the strong language in *Kidd* v. *Pearson,* which had been decided in 1888 (21 Cong. Rec. 1767–1769, 2465, 2467–8). Indeed, in the first case to reach this Court under the Sherman Act, *United States* v. *E. C. Knight Co.,* 156 U. S. 1 (1895), the Court held that a combination of manufacturers whose products moved in interstate commerce could not be reached under the commerce clause.

These two expressions, one shortly before and one after 1890, certainly manifested the Court's, and perhaps Congress', view of the scope of the commerce power when the Sherman Act was passed. But this has not deterred the Court from holding the Act applicable to combinations of producers, once the inadequacies of the constitutional reasoning of the earlier cases were recognized. (Cf. *Addyston Pipe and Steel Co.* v. *United States,* 175 U. S. 211; *Swift & Co.* v. *United States,* 196 U. S. 375; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 68–69; *United States* v. *Amer-*

ican Tobacco Co., 221 U. S. 106; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37; cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39–40, and cases cited; *Wickard* v. *Filburn*, 317 U. S. 111, 121–122.) On appellants' reasoning, the doctrine of *Kidd* v. *Pearson*, which like *Paul* v. *Virginia* involved the validity of a state police regulation, would have been frozen permanently into the Sherman Act.

C. THE HISTORY OF THE SHERMAN ACT SINCE 1890 DOES NOT JUSTIFY A RESTRICTIVE INTERPRETATION EXEMPTING THE INSURANCE INDUSTRY

Appellees argued below both that Congress in 1890 intended that the Sherman Act not apply to the insurance business and that its action, or inaction, since then, reflects a continuing intention to the same effect. We believe that we have shown that Congress did not mean its awareness of the Court's decisions prior to 1890 to have the effect of incorporating them by reference into the permanent content of the Sherman Act. The few pertinent occurrences since 1890 are entirely consistent with this view.

As a consequence of this Court's decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), many members of Congress assumed that the Sherman Act had been rendered entirely ineffective as a means of destroying monopoly in

production or manufacture. In 1900 the House Committee on the Judiciary favorably reported a resolution to amend the Constitution so as to give Congress "power to define, regulate, prohibit, or dissolve trusts, monopolies, or combinations, whether existing in the form of a corporation or otherwise" (H. J. Res. No. 138, 56th Cong., 1st Sess.; H. Rept. No. 1501, 56th Cong., 1st Sess.). The Committee Report and the House debate (33 Cong. Rec. 6307–6328, 6335–6336, 6348–6349, 6396–6426), discussed the *Knight* decision at considerable length. The conclusion of Representative Ray, who submitted the Committee Report, was that (33 Cong. Rec. 6312):

> The constitutional power of Congress to regulate commerce among the several States does not give it any power to regulate or control manufacture or production, however much it affects or dominates that commerce.

The report and debate refer several times to state antitrust laws, two of which are said to apply exclusively to insurance companies. H. Rept. No. 1501, p. 9; 33 Cong. Rec. 6488. The amendment was opposed by the Democratic minority in part upon the ground that it would interfere with the power of the states to destroy monopoly. Representative Terry, for the minority, stated in this connection (33 Cong. Rec. 6319):

> Up to the present time the only legislation against trusts that has amounted to anything has been State legislation honestly enforced. Texas has brought the Waters-Pierce Oil Company monopoly to its knees. ***Missouri has brought the insurance trust to its knees,*** and under the laws of Ohio, had your party there but upheld the hands of Attorney-General Monett, the Standard Oil monopoly would have been driven from the State. [Italics supplied.]

The illustrative reference to oil and insurance as "trusts" is hardly consistent with appellees' suggestion that insurance is not the type of industry to which Congress could have intended an antitrust law to have applied.

The proposed amendment was not approved by the requisite two-thirds majority (33 Cong. Rec. 6426).[36] The House thereupon debated (33 Cong. Rec. 6476–6502) and passed (*id.*, 6502) by a vote of 274–1 a bill designed to strengthen the Sherman Act. At the next session, the Senate Judiciary Committee refused to report the measure, and a resolution to discharge it from consideration of the bill was debated (34 Cong. Rec. 2726–2734). Near the close of the debate, Senator Spooner, a member of the Committee stated (34 Cong. Rec. 2734):

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[36] The vote was 154 in favor, 132 against.

I am not willing to enact legislation here upon a subject which I believe to be unconstitutional and entirely ineffective for any party purpose.

Mr. CULLOM. Or any other.

Mr. SPOONER. Or any other. There is legislation upon the statute books. Our jurisdiction to deal with this question is derived from that clause of the Constitution which gives to Congress power to regulate commerce among the States, with Indian tribes, and with foreign countries. *So far as the power falls within the interstate-commerce clause, a law years ago was drawn which was intended to exhaust the Federal jurisdiction upon the subject.* I was a member of the Senate at the time. It was committed to the Judiciary Committee, a defective bill having been introduced by Mr. Sherman. Time was taken in that committee. Great lawyers were upon that committee who participated in the report. Senator Edmunds was its chairman. The distinguished Senator from Massachusetts [Mr. HOAR], than whom I know no greater lawyer, had to do with the drafting of the bill. Senator George, of Mississippi, who was a great lawyer, participated in that work. Senator Vest, of Missouri, a great lawyer and an apt legislator, also participated in that work. That bill was reported to the Senate, and it was intended to be so, and it was so, *drawn as to exhaust the Federal jurisdiction upon the subject;* and so far as the

> Supreme Court of the United States has had occasion to deal with it, it has so held, in my opinion. [Italics supplied.]

The motion to discharge was then defeated, 24–36 (34 Cong. Rec. 3438, 3439).

Here is a reaffirmation of the legislative understanding that the original antitrust law "was intended to exhaust the Federal jurisdiction on the subject." But the limits of that jurisdiction were apparently still thought to be those laid down in the *Kidd* and *Knight* cases.

During the administration of President Theodore Roosevelt special consideration was given to the possibility of Federal regulation of the insurance industry, though not in direct relation to the antitrust laws. In 1903, in the law creating the Department of Commerce and Labor, the Department was authorized, through the Bureau of Corporations, "to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States *as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance*" (32 Stat. 825, c. 552, § 6). [Italics supplied.] Even though this measure was limited to the gathering of information, on its face it suggests that Congress was of the view that insurance corporation were engaged in interstate commerce.

In 1904 and 1905, in his messages to Congress, President Roosevelt recommended:

> * * * that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance.
>
> Recent events have emphasized the importance of an early and exhaustive consideration of this question * * *.
>
> The Congress has already recognized that interstate insurance may be a proper subject for Federal legislation, for in creating the Bureau of Corporations it authorized it to publish and supply useful information concerning interstate corporations, "including corporations engaged in insurance." It is obvious that if the compilation of statistics be the limit of the Federal power it is wholly ineffective to regulate this form of commercial intercourse between the States, and as the insurance business has outgrown in magnitude the possibility of adequate State supervision, the Congress should carefully consider whether further legislation can be had.

As a result of these recommendations, the House Judiciary Committee in 1906 issued a report (H. Rep. No. 2491, 59th Cong., 1st Sess.) in which it concluded, after a lengthy analysis of this

Court's most confining opinions as to the scope of the commerce clause" (p. 25):

> First. That the commerce clause of the Constitution does not confer upon Congress the power to regulate or control the business of insurance.
>
> Second. That the Constitution does not confer upon Congress the power to regulate or control State corporations operating within the States except so far as they may be engaged in interstate commerce.

The constitutional reasoning of this report outside of the insurance field has since been repudiated by Congress and also by the Court. The latter has been true not only generally but in relation to the Sherman Act in particular.[98] We see no reason why the comments upon insurance should alone be entitled to greater sanctity.

We have been able to discover only one reference to insurance in the proceedings culminating in the passage of the Clayton Act. During the debate in the House, the following colloquy occurred (51 Cong. Rec. 9390):

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[97] The Report relies in large part upon *United States* v. *E. C. Knight Co.*, 156 U. S. 1, and *Kidd* v. *Pearson*, 128 U. S. 1. Strangely enough, the dissent in the *Lottery* case is cited (though not as a dissent), and the majority opinion in that case and *Swift & Co.* v. *United States*, 196 U. S. 375, and *Northern Securities Co.* v. *United States*, 193 U. S. 197, which had been decided in the preceding two years and which suggested a much broader view of the commerce power than the Committee was evidently prepared to accept, were not mentioned.

[98] See cases cited pp. 81–82, *supra*.

Mr. BARTON. We had an illustration recently where a big fire insurance company came into the State where local insurance companies have been doing business, not confined to the border of the State, and cut prices in that immediate locality until we had in three States 40 or 50 local companies put out of business, and then the price was put back where it was profitable to the company. Might not this same condition exist where we started a wholesale house in a State where their territory was confined to the State—might it not be a reduction of prices for putting that institution out of business?

Mr. WEBB. If the purpose is to wrongfully injure or destroy a competitor, this section will cover such practice; but insurance companies are not reached, as the Supreme Court has held that their contracts or policies are not interstate commerce.

Mr. BARTON. It is not right that they should come within the law?

Mr. WEBB. Yes.

This would seem to suggest that it was only the compulsion of this Court's decisions, rather than any intention on the part of Congress, which had prevented the antitrust laws from being applied to insurance.

In 1920, Congress incorporated in the Merchant Marine Act (41 Stat. 988) a clause designed to encourage the development of American marine

insurance companies through relaxation of the restrictions of the antitrust laws (41 Stat. 1000, 46 U. S. C., § 885). Section 29 of the Act provides that:

> Nothing contained in the "antitrust laws" * * * shall be construed as declaring illegal an association entered into by marine insurance companies *for the following purposes:* To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of the component members. [Italics supplied.]

The implication in the italicized phrase that no complete exemption from the antitrust laws was intended [99] is confirmed by the Senate Committee Report (S. Rep. No. 573, 66th Cong., 2d sess., p. 9), which states, with respect to the exemption:

> *Under certain conditions* we relieve marine insurance associations or companies from the restrictions of the antitrust laws. We believe that the interests of our country are fully protected by the limitations placed upon these associations, and if we

[99] The Act permits the marine insurance companies to combine, but presumably would not allow them to compel competitors who were unwilling to join with them voluntarily to do so or go out of business. Thus, if appellees were marine insurance companies, the Act would not exempt from the Sherman Act the conduct ascribed to them in the indictment.

> can develop marine insurance as it should be developed in this country we can do nothing better for an American marine. Only about 10 percent of our hull insurance and only about 25 or 30 percent of all kinds of our marine insurance are done today by American companies. [Italics supplied.]

There was, of course, doubt as to whether the exemption was necessary, in view of the insurance cases. The attitude of the industry, and also of the Subcommittee of the House Committee on Merchant Marine and Fisheries, appears from the recommendations of the Subcommittee:[1]

> In addition to the foregoing, your committee believes that the Federal Government may be of further assistance in several respects, and desires to recommend the following:
>
> (1) That marine underwriters should be assured of the legality of combinations and associations designed to facilitate reinsurance or to extend underwriting activities to foreign countries. A surprisingly large number of underwriters expressed themselves to the committee as fearful of the legal consequences that might attach to the creation of such associations or combinations. To this end, it will be advisable, and even if unnecessary can do no harm, to free all such cooperative efforts from the pos-

[1] Printed with S. S. Huebner, *Report on Status of Marine Insurance in the United States*, Government Printing Office, 1920, p. 78.

sible operation of the Sherman and Clayton Antitrust Acts.

But the passage of the bill, together with the above remarks of the Senate Committee and House Subcommittee, strongly suggests that as of that time, thirty years after the passage of the Sherman Act, Congress did not regard itself as committed to the proposition that the antitrust laws could not apply to the insurance business. As this Court has indicated in an analogous situation, the enactment of a partial exemption from the Sherman Act recognizes "that to some extent not defined," the activities exempted "remain subject to it" (*Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488).

Appellees argue that the failure of Congress to amend the Sherman Act so as to bring fire insurance within its purview shows a legislative intention that fire insurance be exempt. The specific exemption for marine insurance would seem to show that Congress understood that amendment was necessary to remove insurance from the Act's prohibitions rather than the contrary. But in any event the failure to amend obviously shows nothing. If the insurance business was not reached under the terms of the Act, this was only because of this Court's constitutional decisions, not because of any deficiencies in the Act's provisions. If the Court was prepared to depart from the language of the insurance cases insofar as

the exercise of federal power was concerned, the Sherman Act would apply to insurance, as it did to manufacturing in similar circumstances, without further amendment. If the Court adhered to the confining remarks in the insurance cases, amendment of the law would have been futile.

Appellees point to the failure of Congress to enact other bills, unrelated to the antitrust laws, designed to regulate the insurance industry. None of these bills reached the floor of either house, and they may have died for any number of reasons.[2] But even if it be assumed that the failure of Congress to proceed with such measures resulted from its knowledge of this Court's decisions, this would not prove that Congress intended to limit the scope of a statute previously passed which exercised its entire commerce power without restriction.

Appellees below also attempted to derive advantage from the failure of Congress to approve an anticombination provision in a bill proposed to regulate insurance companies in the District of Columbia. In 1900 the House Committee on the District of Columbia favorably reported a regula-

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[2] In their brief below appellees adverted specifically to H. R. 9629, 52d Cong., 1st Sess.; S. 2736, 55th Cong., 2d Sess.; and S. 7277, 58th Cong., 3d Sess. It has been suggested that the first two of these measures were rejected because of considerations not relevant to the issue here. See Senator John F. Dryden, an address on *The Regulation of Insurance by Congress* (delivered before the Boston Life Underwriters Association, November 22, 1904), pp. 22, 26.

tory bill containing no antitrust provision (H. R. 2283, 33 Cong. Rec. 3644–3646). Representative McRae offered an amendment, which he explained as follows (*Id.*, at 3652–3):

> If insurance companies are to be permitted to organize and do business in the District of Columbia under this, or even under existing laws, we ought to protect the people from the exorbitant rates charged by those companies, as stated by the gentleman from Iowa [Mr. Hepburn], and as known to every man who has made inquiry about it.
>
> As soon as an opportunity presents itself, I shall move this amendment, which I will ask the Clerk to read. It is a prohibition against any agreement on the part of insurance companies that do business within the District of Columbia to maintain what is commonly known as "board rates"—in other words, to abolish the *insurance trust* in the District of Columbia.
>
> * * * * *
>
> The purpose of that amendment is to prevent combinations on the part of the insurance companies to maintain exorbitant rates. It has been adopted in a great many States, and in all the States where it has been adopted it has proved a benefit to the people who seek insurance and who have to have it. [Italics supplied.]

The amendment was adopted without objection, and the bill passed as amended (*id.*, at 3655).

The entire bill apparently died in Senate Committee (see *id.*, 3667). Inasmuch as there had been objections in the House to other features of the bill (*id.*, 3647–55) but not to the one in question, it is not reasonable to attribute the failure of the measure to pass the Senate to the antitrust section. The debate shows, on the contrary, that in 1900 Congress regarded combinations of insurance companies as a "trust."

We have reviewed these expressions of legislative intention since 1890, in order to disprove appellees' contention that they manifest an affirmative intention on the part of Congress that the Sherman Act not apply to insurance. Some of the most significant of the occurrences to which we have referred point in the contrary direction. Inasmuch as, if the insurance business is in commerce, the activities of appellees plainly come within both the words of the statute and the legislative purpose to stamp out monopoly to the extent permitted by the federal commerce power, the burden is upon appellees definitely to prove that Congress did not intend the language of the act to be given its full meaning. This burden has not been sustained.

Appellees stress the fact that the Sherman Act has not in fifty years been applied to the insurance business, and urge that the absence of prosecutions or other cases manifests a general understanding that the Act was not applicable to in-

surance. The cases mainly relied upon are those in which the Court has refused as a matter of statutory construction to overturn prior constitutional decisions insofar as they had been embodied and recognized in legislative enactment (*Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Helvering* v. *Griffiths*, 318 U. S. 371). But those cases do not suggest that a statute which uses language as broad as that of the Constitution must always be more narrowly construed to accord with prior judicial decisions no longer approved by the Court. Cf. the history of the Sherman Act itself, *supra*, pp. 81–82, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (affecting commerce); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. Only where an intention on the part of Congress to confine the Act in accordance with prior decisions plainly appears will the Court fail to give the words of such a statute their full meaning.

In the *Parker* and *Griffiths* cases the Court found not mere knowledge of its prior decisions, but an affirmative intention on the part of Congress that they be given effect in the particular statute. The Longshoremen and Harbor Workers Compensation Act, considered in the *Parker* case, was designed to fill a hiatus of undefined extent in workmen's compensation coverage left by *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; if the *Jensen* doctrine had been abandoned for purposes of that Act, the uncertainty which the Act was designed

to prevent would have been intensified, a result obviously not contemplated by Congress. And in the *Griffiths* case, the Congressional proceedings and debates contained specific statements which were regarded by the majority of the Court as indicating that the amended statute was not intended to be construed in a manner inconsistent with the prior decision in *Eisner* v. *Macomber*, 252 U. S. 189.

But there is nothing in the history of the Sherman Act to suggest that Congress wished its language not to be given the full scope of its constitutional counterpart. There was awareness of the doctrine of the insurance cases and of its probable effect upon the interpretation of the Sherman Act, but nothing more; indeed, in the political climate of the times, any intention to exempt the "insurance trust" (33 Cong. Rec. 3652, 6319), except under the compulsion of judicial decision, would have been remarkable. (See pp. 105–108, *infra*.)

Nor does the fact that for many years no antitrust cases were brought against insurance companies show that *Paul* v. *Virginia* was regarded by the Department of Justice as having been incorporated into the Sherman Act. The institution of suits would have been futile until there was reason to believe that the Court no longer would adhere to the pronouncement that "insurance is not commerce." The first definite indica-

tion to that effect was the restatement of the rule, in a manner entirely consistent with application of the Sherman Act to insurance, in *Western Livestock* v. *Bureau of Internal Revenue*, 303 U. S. 250, discussed *supra*, pp. 33–34, decided in 1938. The decision in the *American Medical Association* case, with respect to an enterprise similar to but not as commercial as the insurance business, also seemed to manifest a conception of "trade or commerce" incompatible with that contained in the insurance cases.[3] In addition, the Court's approach to problems as to the scope of the commerce power generally had become imbued with a sense of the earlier and broader scope of its coverage, which we believe had been departed from.[4] The failure to apply the Act to insurance under the compulsion of decisions clearly was not a voluntary administrative interpretation of the Act. (Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 119–121.)

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[3] The final decision of this Court in the *Medical Association* case did not come until after the institution of the present suit. But the Court of Appeals for the District of Columbia had on two occasions held that the Sherman Act applied (110 F. (2d) 703, 130 F. (2d) 233), and this Court had denied certiorari from the first of these decisions (310 U. S. 644).

[4] Compare *Kidd* v. *Pearson*, 128 U. S. 1, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, *Mulford* v. *Smith*, 307 U. S. 38, *United States* v. *Darby*, 312 U. S. 100, and *Wickard* v. *Filburn*, 317 U. S. 111.

United States v. *Cooper Corporation*, 312 U. S. 600, and *Federal Trade Commission* v. *Bunte Brothers*, 312 U. S. 349, upon which appellees rely, were of an entirely different character. Inaction on the part of the executive branch of the Government with respect to the problems presented in those cases was not pursuant to judicial compulsion. Indeed, in the *Bunte* case, the judicial decision most closely in point and suggesting a broader interpretation of the Federal Trade Commission Act (*The Shreveport Case*, 234 U. S. 342) was decided in 1914, shortly before the Act was passed. Moreover, a construction of that Act as only applying to transactions "in" interstate commerce was supported by its language. Thus, in neither of these cases was the administrative inaction the result of the coercion of judicial pronouncements.

The contrary is true here. The barrier to application of the Sherman Act to the insurance business has been erected by the judiciary, not the legislative nor the executive, and since it rests upon constitutional doctrine, only the judiciary can remove it.

D. THE ARGUMENT THAT AN EXEMPTION FOR INSURANCE COMPANIES SHOULD BE READ INTO THE SHERMAN ACT BECAUSE OF THE PECULIARITIES OF THE INSURANCE BUSINESS IS WITHOUT MERIT

Appellees have also argued that an exception should be read into the Sherman Act for insurance on the theory that free competition among

insurance companies is detrimental to the public interest. In meeting a similar argument, this Court declared with admirable foresight in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 351, 352:

> Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. * * *
>
> But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in

> prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. * * *

As the above case holds, it is for the legislature and not for the judiciary to determine whether competition or combination is the economic policy to be adopted. Both national and most state legislatures have enacted antitrust laws of general application and have provided by special statutes for those industries in which unlimited competition was thought to be undesirable.[5] These regula-

[5] Federal statutes containing provisions specifying the extent to which exemptions from the antitrust laws are granted include the following: Interstate Commerce Act, § 5 (15), 48 Stat. 219, 49 U. S. C., § 5 (15); Emergency Railroad Transportation Act of 1933, § 10 (a), 48 Stat. 215, 48 Stat. 1740, 49 Stat. 376, 49 U. S. C. § 260; Motor Carrier Act, § 213 (f), 49 Stat. 555, 557, 49 U. S. C. § 313; Webb Export Trade Act, §§ 1-5, 40 Stat. 516, 15 U. S. C. § 61–65; Shipping Act, 1916, §§ 1, 15, 39 Stat. 728, 733, 46 U. S. C. §§ 801, 814; Marine Insurance Association Act, § 29 (a) and (b), 41 Stat. 1000, 46 U. S. C. § 885; Capper-Volstead Act, §§ 1-2, 42 Stat, 388, 7 U. S. C. §§ 291, 292: Agricultural Adjustment Act of 1933, Agricultural Marketing Agreement Act of 1937, §§ 8b and 8d (1), 48 Stat. 31, 48 Stat. 528, 49 Stat. 753, 50 Stat. 246, 7 U. S. C., § 608b; Provisions of Agricultural Adjustment Act relating to Anti-Hog-Cholera Serum and Hog-Cholera Virus, §§ 56 and 57, 49 Stat. 781, 7 U. S. C. §§ 851–852; Bitu-

tory acts adopt other means of safeguarding the public interest against unregulated monopoly, and customarily do not grant total exemptions from the antitrust laws but only to the extent that particular conduct is administratively approved.

The argument that the competitive structure guaranteed by the Sherman Act would be harmful to the public interest has been advanced by other industries, as the above quotation from the *Northern Securities* case suggests. Public utilities are generally separately classified in large part for this very reason; the advantages of monopoly from the viewpoint of efficiency led to government supervision, and a *pro tanto* waiver of the antitrust laws. There can be no question, however, but that public utilities are subject to the Sherman Act in the absence of a specific exempting statute. This was settled in the second case to come before this Court under the Act (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897)), and has not been doubted since.*

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minous Coal Act of 1937, §§ 4 I (d) and 12, 50 Stat. 72, 15 U. S. C., §§ 832 (d), 842; National Industrial Recovery Act, § 5, 48 Stat. 198; Consolidations and Mergers of Telegraph Carriers—Public Law No. 4, 78th Congress, 1st Session, March 6, 1943 (amending Communications Act of 1934).

* *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Terminal Railroad Association*, 224 U. S. 383; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Company*, 253 U. S. 26; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

In the *Trans-Missouri Freight Association* case it was argued that the railroads which were charged with combining to fix rates were public utilities, that their nature was such that competition in rates was undesirable, that they were regulated under the Interstate Commerce Act, and that Congress did not intend the antitrust law to apply to them. In rejecting these contentions, the Court held that the Act must be construed in accordance with its language to reach all combinations and not merely the trusts which Congress had most directly in mind (166 U. S., at 319). The Court used language which exactly applies to this case, if the word "insurance" is used in place of "railroad" (pp. 321–325):

> It is also urged that there are evils arising from unrestricted competition in regard to railroads which do not exist in regard to any other kind of property, that it is so admitted by the latest and best writers on the subject, and that practical experience of the results of unrestricted competition among railroads tends directly to the same view; * * *. It is, therefore, claimed to be the duty of the court, in carrying out the rule of statutory construction, above stated, to restrict the meaning of these general words of the statute which would include railroads, because, from the considerations above mentioned, it is plain that Congress never intended that railroads should be included.

> Many of the foregoing assertions may be well founded, while at the same time the correctness of the conclusions sought to be drawn therefrom need not be conceded. * * * It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest.

A considerable number of the important cases under the Sherman Act have been brought against the railroads,[7] and it is clear that except to the extent specifically provided in the Interstate Commerce Act, they are subject to the antitrust law. It is unquestioned that other public utilities also come within the purview of the Sherman Act.[8]

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[7] See cases cited *supra*, note 6, p. 102, and *United States* v. *Pacific and Arctic Ry. Co.*, 228 U. S. 87; *United States* v. *New York, New Haven and Connecticut R. Co.* (S. D. N. Y. 1914) Eq. 11–301 (consent decree); *United States* v. *Nevada Northern Ry. Co.* (D. Nev. 1933) No. 8856 (pleas of *nolo contendere*); *United States* v. *Association of American Railroads*, 36 F. Supp. 225 (D. D. C. 1941) (consent decree); *United States* v. *Pullman Co.*, 50 Supp. 123 (E. D. Pa. 1943).

[8] *United States* v. *Northern Pacific Wharves and Trading Co.*, 4 Alaska 552 (1912); *United States* v. *Columbia Gas and Electric Co.*, 27 F. Supp. 116 (D. Del. 1935) (consent decree); *United States* v. *Great Lakes Steamship Co.* (N. D. Ohio 1928) No. 2456 (consent decree); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 217 Fed. 656 (N. D. Ohio 1914); *United States* v. *American Tel. & Tel. Co.* (D. Ore. 1913) No. 6082 (consent decree); *United States* v. *Postal Tel. & Cable Co.* (S. D. N. Y. 1937) Eq. 86–128 (consent decree); *United States* v. *Freightways* (N. D. Cal. 1943) No. 22075–R (consent decree).

Insurance companies were no more immune than the railroads from the public hostility toward monopoly during the era in which the Sherman Act became law.[9] Between 1885 and 1912, twenty-three states enacted laws forbidding insurance combinations.[10] In seven of these states insur-

[9] See the congressional references to the "insurance trust" *supra*, pp. 84, 94.

[10] Twenty-two of these statutes were general prohibitions against the joint fixing of rates, while one (North Carolina) applied to other forms of joint activity: L. N. H. 1885, ch. 93, p. 289 [Rev. L. N. H. (1942), ch. 325, § 15]; L. Ohio 1885, No. 284, p. 231 [Throckmorton's Ohio Code Ann. (Baldwin, 1940), § 9563]; L. Mich. 1887, No. 285, p. 384 [Mich. Stat. Ann. (Henderson, 1937), § 24.99]; L. Kan. 1889, ch. 257, p. 389, and L. Kan. 1897, ch. 265, p. 481 [Gen. Stat. Kan. (Corrick, 1935), §§ 50–101, 50–112]; L. Ga. 1890–91, No. 745, p. 206 [Ga. Code Ann. (1937), § 56–219]; L. Maine 1893, ch. 285, p. 339 [repealed: L. Maine 1895, ch. 26, p. 24]; L. Mo. 1895–97, p. 237 [Mo. Rev. Stat. Ann. (1943), §§ 8302, 8304, 8307, 8311, and 8317]; L. Iowa 1896–97, ch. 22, p. 31 [Iowa Code (1939), § 9010]; L. Ala. 1896–97, No. 634, p. 1428 [repealed: Ala. Gen. Acts 1923, No. 359, p. 381]; L. Neb. 1897, ch. 79, p. 347; L. Neb. 1897, ch. 81, p. 354, L. Neb. 1913, ch. 154, p. 419 [Comp. Stat. Neb. (1929), §§ 44–321, 59–101, and 59–301]; L. Wis. 1897, ch. 356, p. 908 [Wis. Stat. (1941), § 203.23]; Acts Va. 1898, ch. 644, p. 683 [repealed: Acts Va. 1901–2, ch. 615, p. 729]; Acts S. C. 1902, No. 574, p. 1057 [Code S. C. (1942), § 6624, et seq.]; L. S. D. 1903, ch. 158, p. 183 [S. D. Code (1939), § 31.2310]; G. L. Tex. 1903, ch. 94, p. 119 [Vernon's Rev. Civ. Stat. (Tex., 1939), Art. 7426]; Ark. Acts 1905, No. 1, p. 1, as amended by Ark. Acts 1907, No. 184, p. 430 [Ark. Stat. (Pope, 1937), §§ 9407, 9408]; P. L. N. C. 1905, ch. 424, p. 429, and P. L. N. C. 1915, ch. 166, p. 243 [N. C. Code (Michie, 1939), § 6432]; Acts Tenn. 1905, ch. 479, p. 1019 [amended Pub. Acts Tenn. 1919, ch. 8, p. 32, and repealed by Pub. Acts Tenn. 1919, ch. 33, p. 82]; Miss. Code 1906, § 5002, adopted L. Miss. 1906, ch. 101, p. 78 [The

ance combinations were also held to violate the general antitrust law[11] and in three additional states were held subject to the common law doctrine as to restraint of trade.[12] In two states, Texas and Kentucky, the court held the general

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provisions relating to insurance rate agreements were retained through the 1927 Code but did not appear in the 1930 Code]; Gen. L. Ore. 1909, ch. 230, p. 399 [Ore. Comp. L. Ann. (1940), § 101–142]; Sess. L. Wash. 1911, ch. 49, p. 195, and Sess. L. Wash. 1915, ch. 97, p. 278 [Remington's Rev. Stat. Wash. (1932), § 7076]; L. Ariz. 1912, ch. 73, p. 354 [Ariz. Code Ann. (1939), § 74–101, et seq.]; Acts La. 1912, No. 224, p. 509 [La. Gen. Stat. (Dart, 1939), § 4173, et seq.]. See also L. N. D. 1925, ch. 153, p. 181 [N. D. Comp. L. (Supp. 1913–1925), § 4964a1] containing provisions against discrimination against agents, and against the practice of separation.

[11] *Firemen's Fund Insurance Co.* v. *Hellner*, 159 Ala. 447, 49 So. 297 (1909); *Hartford F. Insurance Co.* v. *State*, 76 Ark. 303, 89 S. W. 42 (1905); *Beechley* v. *Mulville*, 102 Iowa 602, 70 N. W. 107 (1897); *Re Pinckney*, 47 Kan. 89, 27 Pac. 179 (1891); *State* v. *Phipps*, 50 Kan. 609, 31 Pac. 1097 (1893); *Hartford F. Insurance Co.* v. *Raymond*, 70 Mich. 485, 38 N. W. 474 (1888); *Fire Insurance Cos.* v. *State*, 75 Miss. 24, 22 So. 99 (1897); *State ex rel. Crow* v. *Firemen's Fund Insurance Co.*, 152 Mo. 1, 52 S. W. 595 (1899); *State v. American Surety Co.*, 91 Neb. 22, 135 N. W. 365 (1912). See 21 A. L. R. 543.

[12] *People* v. *Aachen & M. F. Insurance Co.*, 126 Ill. App. 636 (1905); *McCarter* v. *Firemen's Insurance Co.*, 74 N. J. Eq. 372, 73 Atl. 80 (1909); *Metzger* v. *Cleveland & Adams*, 28 Ins. L. J. 176 (Ind. 1899) (quoted in 21 A. L. R. 544). *Contra: People ex rel. Pinckney* v. *New York Board of Fire Underwriters*, 7 Hun. 248 (N. Y. 1876); *Aetna Insurance Co.* v. *Commonwealth*, 106 Ky. 864, 51 S. W. 624 (1899); *Louisville Board Fire Underwriters* v. *Johnson*, 133 Ky. 797, 119 S. W. 153 (1909); *Booker & Kinnaird* v. *Louisville Board of Fire Underwriters*, 188 Ky. 771, 224 S. W. 451 (1920); *Harris* v. *Commonwealth*, 113 Va. 746, 73 S. E. 561 (1912). In

antitrust laws inapplicable to insurance,[13] but the Texas decision was overturned by specific legislation.[14] In sustaining the constitutionality of an Alabama anticombination law, this Court itself stated (*German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 316):

> * * * We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411.

Although this state legislation does not bear directly upon the construction of the Sherman

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Continental Insurance Co. v. *Board of Fire Underwriters of the Pacific*, 67 Fed. 310 (N. D. Cal., 1895), a suit brought under the common law to restrain a combination of fire insurance companies, Circuit Judge McKenna held that no cause of action was stated with respect to the companies' refusal to designate any agent who also represented the plaintiff company but that other conduct, including threats against agents and customers, was actionable.

[13] See the *Kentucky* cases cited in the preceding note and *Queen Insurance Co.* v. *State*, 86 Tex. 250, 24 S. W. 397 (1893). For a similar decision in recent years see *Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934).

[14] See the Texas statute cited in note 10, *supra*.

Act, it significantly manifests the climate of opinion when the antitrust law was passed. A trust-busting Congress of that period, it can be assumed, would not have regarded insurance alone as an industry in which competition was so evil and undesirable as to warrant a special exemption from the antitrust law. Not until a later time were some of these antitrust laws superseded by legislation which authorized combinations of fire insurance companies.[15] But it is the period around 1890 with which we are concerned.

Appellees contend that the uneconomic nature of competition in the fire-insurance industry is so axiomatic that fire insurance could not have been intended to be included under the provisions of the Sherman Act. We have already suggested that this was not the view of the representatives of the people in 1890 when the Sherman Act was passed. It is our purpose here to show that the arguments advanced by the appellees and the writers cited by them in the brief below do not prove that it would be unreasonable to subject the fire-insurance industry to the antitrust laws.

1. It is claimed that there is no place for competition in the fixing of rates in fire insurance because the premium rate is based on the burning rate or incidence of loss, which is a scientific prob-

[15] The status of existing state laws is considered *infra*, pp. [illegible], *et seq.* Many of these statutes include other safeguards against the uncontrolled establishment of rates by insurance combinations.

ability which can be accurately measured. It is argued that there can be only one correct rate for a given risk, that the companies must be allowed to get together to pool their experience in order to determine scientifically the probability of loss on which the rate is to be based, and that they should cooperate in inspecting properties for rating purposes.[16]

If we assume all this to be true, it does not support appellees' position. In the first place, a cooperative statistical venture truly designed to accomplish only the purpose of providing a scientific basis for the rate structure would not be an unreasonable restraint of trade. Secondly, and even more important, the rating bureau system which is sought to be defended through the appeal to science is not engaged in the function of ascertaining the statistical probability of loss.

(a) There is, of course, a large area in which insurance companies may cooperate on matters of joint interest which do not extend to the fixing of rates. Some of the writers quoted by the appellees in support of cooperation in rate-fixing were referring in part to such other advantages of cooperation as joint action for more adequate supervision of risks, the study of hazards and reduction of incendiarism.[17] The Government does

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[16] Gephart, W. F., *Principles of Insurance* (1917), Vol. II: *Fire*—pp. 125-128, 280, 291.

[17] Zartman and Price, *Yale Readings in Insurance—Property Insurance* (1914), pp. 243-246.

not take issue with any such forms of cooperation. Nor is there any prohibition in the Sherman Act against the exchange of experience by companies and their cooperation in the classification and evaluation of this experience and the compilation of statistical data therefrom. (Cf. *Maple Flooring Assn.* v. *United States*, 268 U. S. 563.) It may be highly desirable for the loss experience of fire-insurance companies to be pooled and analyzed in order that the scientific basis of the industry may approach the accuracy of life insurance. A legitimate function of a joint bureau, such as the present rating bureaus, may well be the formation of burning tables, similar to the mortality tables of life insurance, showing the probability of loss on a property with given characteristics. It may also be conceded as desirable to have such joint bureaus inspect and classify risks, both to reduce costs, and to get more uniform data for scientific rating of hazards. Classification of the risk based on such joint inspection would not mean, however, that the price charged for insuring it would necessarily be the same for all companies.

(b) (i) Even if it be assumed that the rating bureaus scientifically determine the probability of loss on particular properties, this would not justify the establishment of uniform premium rates for all companies. The final premium rates should be sufficient to cover (1) the amount nec-

essary to pay losses, including an amount sufficient to maintain adequate reserves against conflagrations, (2) the administrative expenses, and (3) profits.[18] It is only the first of these factors which is not subject to the control of the individual company, and as to which the joint use of common experience would result in uniformity.

The most scientific determination of the burning rate would not mean that the expenses of all companies are or should be the same, much less their profits. A comparison with life insurance will illustrate the point made. In the practice of fixing life-insurance premiums, while all or most of the companies base their rates on the same tables of mortality, they modify these tables in use to conform with their own experience, use different interest rates and different factors for administrative expense, and come out in the end with different rates to the buyer of life insurance.[19]

The rating bureaus do not determine, on a statistical basis or otherwise, the amount necessary to pay losses (the burning rate), but fix the final premium charged to the insured. If the burning rate were the dominant factor in the final premium, and overhead costs and profits

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[18] Gephart, W. F., *Principles of Insurance*, 1917, Vol. II: *Fire*, p. 104, Moore, F. C., *Fire Insurance and How To Build*, 1903, p. 6.

[19] TNEC Hearings, part 10, pp. 4234–6, 4251, 4253.

merely incidental, there might be little reason to require a differentiation. But it can almost be said that the contrary is true. The record in this case shows that during the ten-year period 1931–1940, in the six southeastern states, fire insurance premiums received by stock companies amounted to $436,000,000, while losses paid amounted to $197,000,000 (R. 8).[20] These figures cover a sufficiently broad geographical area and a sufficiently long period of time to be representative. They show that only about 45 percent of the amount paid by policyholders is necessary to cover the burning rate. This figure leaves a great deal of room for free play between the burning rate and the final premium charged the policyholder.[21]

Appellees are not charged with agreeing on the burning rate, but upon the final premium rate. It does not follow that because cooperation as to the former might be reasonable, both in a general economic sense and within the meaning of the "rule of reason" under the antitrust law, companies must be permitted to use statistical bureaus, as they have, to establish uniform final premium rates and thereby eliminate competi-

[20] These figures are compiled from *Best's Insurance Reports, Fire and Marine* (1942).

[21] See also 89 Cong. Rec. (Dec. 9, 1943) A5777, in which appears a table showing that the percentage of losses to premiums in a selected group of states and the District of Columbia ranges from 24.5 to 50.9.

tion altogether. As this Court knows, statistical organizations controlled by members of an industry are prone to do more than engage in the legitimate function of exchanging information (*Sugar Institute* v. *United States*, 297 U. S. 553; *American Column Co.* v. *United States*, 257 U. S. 377), and the insurance industry is no exception in this respect. The rating bureaus, as now employed to fix rates, go far beyond their economic justification.

(ii) Even the legitimate function of using the pooled experience of the industry to determine an accurate burning rate is not performed under the present rating bureau system. The actual fixing of rates in fire insurance is admitted by the writers on the subject to be based on arbitrary judgment and to have no statistical foundation in experience.[22] The most common method of rating, particularly by rating bureaus such as in the case at bar, is so-called schedule rating. The schedules in common use set forth a base rate (originally determined by the judgment of a group of underwriters) per $100 of insurance for a certain type building designated as standard, and list several hundred charges and credits by which this base rate is to be modified for particular factors held to increase or decrease the risk, such as differences in construction, proximity to a hydrant, the fire-fighting facilities of the city, etc. In using one of the two most popular schedules, the Dean or Analytic Schedule, to rate a particular building, an

[22] "The first [method of fixing rates] is to take the three elements of loss, expense, and profit, without giving particu-

underwriter first selects one of several tables of base rates (ranging from 60c to 120c) which he considers best applicable to his area, then chooses one of six classes of cities, and finally adds and subtracts scheduled percentages for the particular characteristics of the building. In the other schedule, all modifications are made by flat amounts applied to a 25c base rate for a standard building in a standard city.[22a] The rate arrived at by using such a schedule is supposed to cover profits and expenses as well as fire losses.

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ment rate which will represent the whole. That is the method of the fire insurance companies. It is antiquated, out of date, and often discriminatory. * * * 'No progress has been made by the fire underwriters during the past fifty years towards bringing their rate-making method to a scientific basis of true costs * * *.'" Francis J. De Celles, Massachusetts Commissioner of Insurance, *The Legal Aspects of Insurance Cost and Coverage* (American Management Association, 1936), pp. 9, 11; Pink, Louis H., *The Problem of Fire Rates* (Report to the Superintendent of Insurance, New York State, by the Department Staff) (1942), pp. 8–9, 11, 14, 17–18; E. G. Richards, *The Experience Grading and Rating Schedule* (1921); Gephart, *op. cit.* pp. 115–120, 123; Mowbray, A. H., *Insurance, Its Theory and Practice in the United States* (1937), pp. 328–330; Zartman and Price, *Yale Readings in Insurance, Property Insurance* (1914), pp. 165–180, esp. pp. 173, 232; Reed, Prentiss B., *Fire Insurance Underwriting* (1940), p. 265; Huebner, S. S., *Property Insurance* (1922), pp. 238–240, 244, 245–258, esp. p. 256; Dean, A. F., *The Philosophy of Fire Insurance* (1925); Vol. I, pp. 79, 209–210, 254–255.

[22a] For a copy of this schedule, see Moore, *Fire Insurance & How to Build*, pp. 621–843.

Despite the mathematical appearance of the factors entering into the determination of the final rate, neither the base rate (for an arbitrarily selected standard building in a standard city) nor the deviations therefrom are based on any objective analysis of loss experience." The data necessary

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[22] The recent report by the staff of the New York Superintendent of Insurance, cited in the preceding note, states (pp. 8, 9, 14, 17): "The base rate is intended to represent the charge for a standard building, unoccupied and unexposed, in a standard city. It has no statistical basis.

* * * * * * * * "the key rate is not applied uniformly in all schedules nor does it reflect in any way the actual loss experience of the community.

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"The charges reflecting occupancy hazards are not supported by classified experience. There are varying occupancy charges for similar occupancy classes when written under different schedules.

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"Contents rates and differentials are not determined by statistical experience.

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"The statistical classification and rating methods have fallen further and further out of line. At the present time, the experience report has little relationship to rating methods. Many statistical classes include risks rated on several different schedules as well as class-rated risks. They also include groupings of widely different classes of risks of high-rated and low-rated occupancies. For all but one class the experience is that of buildings and contents combined. As a result of the conglomerate nature of such statistics, accurate adjustment of rates cannot be made.

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"A review of fire insurance rating systems reveals two weaknesses: lack of proper statistical information and rating methods unsupported by statistical experience."

for such an analysis are not available and are not being collected."[34] The base rate in particular, which is supposed to express "the unanalyzable parts of the hazard,"[35] represents an arbitrary exercise of judgment. Whatever theoretical justification there may be for permitting companies to combine for the purpose of determining a scientifically accurate premium based on statistical studies of the burning rate, this justification cannot be advanced for the present practices of the companies named in the indictment. The facts of the industry do not show that the price of fire insurance is determined by such scientific methods as to justify removing it from the checks and balances of competitive forces sought to be safeguarded by the Sherman Act.

2. It is often said that the effect of a purely competitive system of rate making is to permit bargaining by each patron with each insurance company in a manner which leads to discrimination between policy holders similarly situated and completely breaks down the rate structure.[36] We

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[34] Many officials and writers have suggested the desirability of basing rates on a statistical analysis of experience. See authorities cited, note 22, *supra*. A plan for a new type of schedule to be based upon statistical data was proposed in 1915 and again in 1921. See Richards, *loc. cit. supra*.

[35] Gephart, *op. cit.*, p. 115; Dean, *op. cit.*, pp. 210, 252.

[36] Dean, A. F., *The Philosophy of Fire Insurance* (1925), Vol. I, pp. 32, 135–137; Huebner, S. S., *Property Insurance* (1938), pp. 347–348.

agree that discrimination between policy holders of the same company is unfair and contrary to the public interest. But the Sherman Act does not prohibit each company from adopting a uniform rating policy any more than it prohibits a seller of commodities from establishing a uniform price for his products. Furthermore, as appellees pointed out in their brief below (p. 29), 36 of the states have laws prohibiting discrimination in rate making, and 43 state laws prohibit the rebating of premiums.[fn] Such statutes are, of course, entirely consistent with the Sherman Act.

The competitive system which the Sherman Act protects thus does not require discrimination in the rates charged by each company. There is a vast difference, however, between the establishment of a policy of uniform rates for comparable risks by each company separately and an agreement between all of the companies that all shall charge the same rates.

It may be argued that if the companies are required to compete, they will inevitably be driven to cutting rates to individual purchasers in order to get business. This does not necessarily follow. Department stores on the same block compete, but each as a matter of business policy charges its own customers the same prices. The need for such a policy is even stronger in the insurance

[fn] The State statutes are summarized in *The Spectator, Fire Insurance Laws, Taxes and Fees, 1942.*

business. Since it is imposed on the companies by law in most states, it can not be assumed that the companies will fail to adhere to it if they are required to compete in other respects.

Finally, it is urged that rate competition would favor the more powerful customers, who could bargain for lower rates to the detriment of the purchasers of smaller quantities of insurance. The same can, of course, be said for any industry. Moreover the present system has resulted in establishing just this sort of rate discrimination.

It is well known in the industry that there are classes of "preferred risks," which are not necessarily properties less likely to burn, but those on which the premium is disproportionately high.[27] The companies "have found that they can levy high rates on dwellings, on contents of dwellings, on churches, on schoolhouses, public buildings, and kindred risks without causing much opposition," but that on "mercantile or factory risks" the opposition of "leading businessmen" will force rates down.[28] This proportion exists not only between commercial and other property, but between large and small businesses. A recent tabulation shows that on many types of large factories, the ratio of

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[27] Zartman and Price, *op. cit.*, pp. 233–234; Mowbray, *op. cit.*, pp. 310, 328, 362, 367; De Celles, *op. cit.*, p. 9.

[28] See Zartman and Price, *loc. cit.* Although this book was written in 1909 and 1914, there is no reason to believe that there has been any change in conditions in this respect.

losses to premiums paid is over 100 percent, on small factories slightly over 50 percent, and on retail stores 17.42 percent.[29] The companies obviously make up their undercharges to the large customers, who are in a position to insure through other facilities, such as mutuals and reciprocals, through excessive charges to the small customers. The entire rate structure is thus loaded against the little man at the present time. Competition between the companies would give him, as well as the large purchasers of insurance, the opportunity to obtain more favorable rates.

3. It is contended that the public's primary concern in the insurance industry is the solvency of the companies and their ability to meet all claims, and that competition among the companies is incompatible with their financial stability.[30]

Again we agree that a first requisite in the insurance business is the soundness of the companies. And it may be that completely unrestricted competition among insurance companies, as among railroads, would be harmful to the public. But application of the Sherman Act to the insurance business does not pose any such "black

[29] See 89 Cong. Rec. (Dec. 9, 1943), A5777.

[30] Moore, F. C., *Fire Insurance and How To Build* (1903), p. 33; Mowbray, A. H., *Insurance, Its Theory and Practice in the United States* (1937), pp. 315, 444; Huebner, S. S., *Property Insurance* (1938), pp. 347–348.

or white" problem. The evils of excessive competition can be, and in fact have been, avoided by lawful means less drastic than the complete elimination of competition in rates.

In the first place, we have already pointed out that a system for the cooperative establishment of burning rates would of itself remedy many of the evils feared by appellees[21] without running afoul of the antitrust laws. We think it not improbable that if the fixing of premium rates by the present bureaus were held to be unlawful, rating bureaus might still remain in existence in order to perform the functions of inspecting and evaluating risks and of establishing burning rates on an over-all experience basis. Secondly, application of the Sherman Act would not necessarily permit discrimination between purchasers similarly situated, for the reasons indicated *supra*, pp. ~~115–117.~~ 116-119.

Thirdly, the soundness of an insurance company's financial position can be guaranteed by measures which do not prevent the companies from competing. Regulations of this sort are found in all the states. A minimum capital and the deposit of funds as security are commonly required. Investments must be in specified types of securities, chosen because of their safety. Other state laws designed to preserve solvency are those

[21] The present rating bureau system does not perform the statistical services which it is claimed are essential to the efficient operation of the industry.

relating to impairment of capital, unearned premium reserve, and limits on the amount of insurance permitted on a single risk. The books of the companies are subject to examination by state officials.[32] If such regulations are not thought sufficient to guarantee the soundness of the companies, they can be made more stringent, particularly through adequate reserve and reinsurance provisions, and through limiting the amount of liability which a company may assume in any single area susceptible to being involved in the same conflagration.[33] It is thus possible to safeguard the condition of the industry within a competitive framework.[34] Moreover, if rate competition is thought to be unwise, the state governments can, as a few of them have, establish the rates themselves, either as a general matter or when rates become too low; rates so fixed by the states would not be affected by the Sherman Act (*Parker* v. *Brown*, 317 U. S. 341).

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[32] The fire insurance laws of all the states are summarized in *The Spectator, Fire Insurance Laws, Taxes and Fees, 1942.*

[33] Cf. 27 McKinney's Consol. L. Ann. (N. Y., 1940), § 319, which provides limits for cooperative fire insurance companies. Other states restrict the insurance which maye be susceptible to a single conflagration. Comp. Stat. Neb. 1929, §§ 44–704; Mont. Rev. Codes Ann. (1935), § 6136; Remington's Rev. Stat. Ann. (Wash. 1932), § 7153.

[34] The companies themselves have voluntarily adopted many of these practices. See Mowbray, *op cit.* pp. 370–374; Huebner, *op. cit.* pp. 179–188; Reed, *op. cit.* pp. 45–58, 308–316.

Finally, it is worth noting that experience demonstrates that competition is not necessarily detrimental to the financial well-being of insurance companies. Lloyds of London is a well-known example of an insurance business conducted not only in competition with other companies but in which the Lloyds underwriters compete among themselves. Indeed Lloyds is so organized as to permit brokers to move freely from one underwriter to another in order to obtain the best proposition.[35] And yet, if we may understate, Lloyds is not regarded as a less reliable insurer than other companies.[36] There is also rate competition among companies in other fields of insurance, such as life insurance. (See p. 111, *supra*.) Companies in these fields are not thought to be less stable than the fire insurance companies.

We do not ask the Court to decide for itself, as a matter of economic fact, whether and to what extent rate competition among fire insurance companies is beneficial. But we think that the above observations show that the economic problem is not as to the effect of requiring insurance companies to operate in a completely free and

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[35] See M. M. Beeman, *Lloyd's London* (2nd ed., Kingswood, Surrey, 1937); Charles Wright and C. Ernest Fayle, *A History of Lloyds* (London 1928).

[36] Beeman, *loc. cit. supra*, p. 96, states that in the last thirty years no holder of a Lloyd's policy has suffered a loss through the failure of an underwriter. The same cannot be said of other types of insurance companies.

unrestrained competitive market, but as to the application of a prohibition against unreasonable restraints of trade in a setting in which the activities of the companies are already to a large extent lawfully confined. For all other industries requiring special treatment, the answer has been that, except as otherwise expressly provided by statute, the antitrust laws apply. The effect of an unregulated price-fixing combination in the insurance field is not so different from those in other industries as to demonstrate that Congress must have intended that insurance be governed by a different rule.

E. THE EFFECT OF A DECISION THAT INSURANCE IS COMMERCE AND SUBJECT TO THE SHERMAN ACT UPON STATE LEGISLATION

Appellees have urged that a reversal of this Court's past doctrine so as to subject insurance to the Sherman Act would nullify the large body of state laws regulating the insurance business. We do not believe that the interpretation of the Sherman Act can depend upon its effect upon state legislation. It is for Congress not the States to determine the policy by which interstate commerce is to be governed. The history of the Act discloses no congressional intention to subordinate the statute to the policies of the states.

But in any event, we do not believe that the consequences of applying the act to insurance

would be as disturbing to state regulation as has been suggested.

1. A decision that insurance is commerce within the meaning of the commerce clause would not in itself invalidate the state taxing and regulatory statutes. The states may tax and regulate interstate commerce if they do not unduly "burden" it. In determining the existence of an unreasonable burden the Court weighs and accommodates "the competing demands of the state and national interests involved" (*Parker* v. *Brown*, 317 U. S. 341, 362; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 505; *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177; *California* v. *Thompson*, 313 U. S. 109; *Duckworth* v. *Arkansas*, 314 U. S. 390; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33).[37]

[37] With respect to the cases upholding state taxation, the Court has stated the reasoning underlying recent decisions as follows: "* * * this Court has sustained a nondiscriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce, see *East Ohio Gas Co.* v. *Tax Commission*, *supra*, but because the tax was not a prohibited regulation of, or burden on, that commerce (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 50." *Illinois Gas* case, *supra*, 314 U. S. 498, at 505). As to the power of the states to regulate interstate prices and rates of a local character, see *Milk Control Board* v. *Eisenberg Farm Products Co.*, 306 U. S. 346; *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; *Port Richmond Ferry Co.* v. *Hudson County*, 234 U. S. 317; *Illinois Natural Gas Co.* v. *Central Pub. Serv. Co.*, *supra*, at 505.

This is to be determined in accordance with "all the relevant facts and circumstances" indicating whether "the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress" (*Parker* v. *Brown*, 317 U. S., at 362).

The early insurance cases in themselves manifest the Court's belief that insurance was a proper subject for local regulation. Indeed, the unnecessary statement that "insurance is not commerce" grew out of the Court's fear that state regulation would otherwise have been impossible.[28] This result we now know does not follow. Nevertheless, to the extent that the insurance cases properly recognized the need for local regulation of insurance in the absence of a federal law, they may

[28] This was the meaning of the statement in *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, at 502, that "To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision." Since the *Deer Lodge* case itself, as well as its predecessors, involved attacks upon state legislation, it was true that a reversal of the prior decisions in that case would have outlawed state regulation of and taxes upon insurance generally, and this was precisely what the insurance companies sought. But that is not true when only the scope of the power of Congress is in issue, as it is here.

still be given effect, and we see no reason why they should not be."[39]

2. Even if the commerce clause would not of itself invalidate state regulation if the insurance business is held to be in commerce, state laws could not, of course, stand to the extent that they are inconsistent with a valid federal statute. It is appellees' contention that application of the Sherman Act to the fire-insurance industry would nullify the state regulatory systems. As has been indicated, we do not think that this is a relevant consideration. Furthermore, the supposed conflict between the Sherman Act and state legislation is greatly exaggerated.

State laws prescribing qualifications necessary for doing business in order to safeguard the interests of policyholders, regulating reserves and investments, providing for the inspection of books and the filing of rates and reports, and prescribing qualifications for agents obviously are not affected by the Sherman Act. The same is true of state antidiscrimination and antirebate laws, and statutes requiring each company to adhere uniformly to rates on file with the state insurance commissioner;[40] these measures do not require an insurance company to engage in conduct which would violate the antitrust law. (See p. 118, *supra*.) Nor would the Act invalidate state statutes which

[39] See pp. 25–30, *supra*.

[40] Cf. *Chicago & N. W. R. Co.* v. *Fuller*, 17 Wall 560.

provide for determination by the state of standard forms of policies and coverage, or of rates and commissions. This Court expressly held in *Parker* v. *Brown*, 317 U. S. 341, that the Act was not intended to and did not apply to state action.

A type of state law which would conflict with the Sherman Act would be one which authorizes a private combination of insurance companies to fix premium rates without the approval of any state authority. The states cannot, of course, nullify the federal act by authorizing private persons or groups subject to the antitrust law to do what that Act forbids. "* * * a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful * * *" (*Parker* v. *Brown*, *supra*, at 351; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332, 344–347).

This limitation would affect the laws of a number of states. But the states by no means have a uniform policy against permitting rate competition among fire insurance companies. Thirteen states have no law which even mentions rate agreements or rate-making organizations.[41] The laws of six states specifically prohibit any combination for the purpose of fixing insurance

[41] Alabama, California, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, Montana, Oklahoma, Rhode Island, Tennessee, and Utah. The same is true as to the District of Columbia.

rates [42] and contain no authorization of rating bureaus or similar organizations. Texas provides for the fixing of rates by the state itself, and Nevada requires rates filed by every fire insurance company to be approved by the State Commissioner before becoming effective.[43] Five states require the establishment of rating bureaus by the industry, but provide that the rates fixed shall not become effective until approved by the proper state authorities.[44] In six states the statutes warrant the conclusion that the rating bureaus are

[42] Ariz. Code Ann. (1939), § 74–101 et seq.; Ga. Code Ann. (1937), § 56–219; Iowa Code (1939), § 9010; Gen. Stat. Kan. (Corrick, 1935), §§ 50–101, 50–112; Comp. Stat. Neb. (1929), §§ 44–321, 59–101, 59–301; Rev. L. N. H. (1942), ch. 325, § 15 [rate agreements among foreign insurance companies licensed to do business in New Hampshire].

[43] Vernon's Rev. Civ. Stat. (Texas, 1940), Art. 4878 et seq.; Nev. Comp. L. (Supp. 1931–1941), § 3656.121. Many other state laws authorize administrative officials to order changes in insurance rates if they think them excessive or, in some cases, inadequate, but do not provide for the state fixing of rates in all circumstances: Ark. Stat. (Pope, 1937), § 7730; Colo. Stat. Ann. (1935), ch. 87, § 157; Ind. Stat. Ann. (Burns, 1933), § 39–4310(1); Gen. Stat. Kan. (Corrick, 1935), § 40–913; Ky. Rev. Stat. (1942), § 298.290; Mich. Stat. Ann. (Henderson, 1937), § 24.51; Miss. Code Ann. (1930), § 5311; Mo. Rev. Stat. Ann. (1943), § 5984; 27 McKinney's Cons. L. Ann. (N. Y., 1940), §§ 184 (4) and 186; Okla. Stat. Ann. (1941), Title 36, § 134; Code S. C. (1942), § 8016; W. Va. Code (1941 Cum. Supp.), § 3379 (d); Wis. Stat. (1941), § 203.39; and Wyo. Rev. Stat. (1931), § 57–217.

[44] La. Gen. Stat. (Dart, 1939), § 4222; Minn. Stat. (1941), § 71.06 [general rate increases]; Miss. Code Ann. (1930), § 5302; S. D. Code (1939), § 31.3705 [general flat changes in rates]; Va. Code (1942), §§ 4314 (1), 4314 (8).

authorized to perform mainly statistical functions and that they are not to be employed as devices for completely eliminating rate competition among the companies."[45] In eleven states rating bureaus are permitted to agree upon rates, but these rates are to be filed with the State Commissioner subject to his disapproval or his general power to reduce rates."[46] The laws of only five states expressly or impliedly authorize or require rating bureaus to establish rates which are not subject to the approval or disapproval of any governmental agency."[47] This summary of the state statutes shows that twenty-one states either expressly forbid the companies to combine for the

[45] Mich. Stat. Ann. (Henderson, 1937), §§ 24.52, 24.54, 24.99–24.101; Mo. Rev. Stat. Ann. (1943), §§ 5972, 8302, 8304; N. J. Stat. Ann. (1939), § 17.29–6; N. M. Stat. (1941), § 60–610; Ore. Comp. L. Ann. (1940), §§ 101–142, 101–1605 (1), 101–1605 (8); Remington's Rev. Stat. Ann. (Wash., 1932), §§ 7076, 7118, 7119.

[46] Ark. Stat. (Pope, 1937), §§ 7730, 7733–7735; Colo. Stat. Ann. (1935), ch. 87, §§ 157–160; Ind. Stat. Ann. (Burns, 1933), §§ 39–4310(l)–(o); Ky. Rev. Stat. (1942), §§ 298.290, 298.300; 27 McKinney's Cons. L. Ann. (N. Y., 1940), §§ 181, 183–186; Throckmorton's Ohio Code Ann. (Baldwin, 1940), §§ 9592–12 through 9592–14; Code S. C. (1942), §§ 8003–8014, 8016; Vt. Pub. L. (1933), §§ 7118–7126; W. Va. Code (1941 Cum. Supp.), §§ 3370–3372, 3379 (d); Wis. Stat. (1941), §§ 203.33–203.34, 203.39–203.40; Wyo. Rev. Stat. (1931), §§ 57–216, 57–217. As to nine of these states see note 43, *supra*.

[47] Idaho Code Ann. (1932), § 40–1601; Jones' Ill. Stat. Ann. (1939), §§ 66.1099–66.1115; N. C. Code (Michie, 1939), §§ 6388–6393; L. N. D., 1929, ch. 152, §§ 1–3; Pa. Stat. Ann. (Purdon, 1930), Title 40, §§ 53–55. In North Carolina, the State Insurance Commissioner may hold a hearing with

making of rates or do not authorize such conduct in any way." In six states, rating bureaus would appear to be authorized to make only actuarial recommendations, and not joint agreements upon rates. In the five states in which rates determined by joint bureaus do not become effective until the approval of the state commissioner has been obtained, a rate so approved might well become the act of the state government. Cf. *Parker* v. *Brown*, 317 U. S. 341. In all of these states the fixing of rates by private combinations is not sanctioned by state law. This leaves only those five states which authorize the rating bureaus created by the industry to fix rates generally without governmental check and the eleven states in which bureau-fixed rates may be operative unless disapproved by state authorities. The Sherman Act would apply to rates fixed in the first of these two groups, inasmuch as a state cannot by law authorize private conduct which the Sherman Act forbids. *Ibid.* Whether rates fixed in the latter group would be unlawful might depend upon how they were established. If approved by the state commissioner, or independently promulgated by him (as is possible in nine of the eleven states),[49] they might be re-

respect to the adequacy of the rates agreed upon and publicize his conclusions, but has no power to veto such rates except where they are discriminatory within a class of hazard.

[48] See notes 41, 42, 43, *supra*.

[49] In at least nine of these eleven states (see note 43, *supra*) the commissioners may order reductions in rates.

garded as the act of the state; if the effective rate were that established by the bureau in the absence of any official approval, it would appear to be the act of a private combination and subject to the anti-trust law.[80] In, at most, two of the states covered by the indictment (North Carolina and South Carolina) do the statutes purport to authorize private combinations to fix rates without public approval,[81] and in neither of these would appellees' attempt to enforce their rating policies by boycott and coercion find any support.[82]

This review of the relationship between the anti-trust law and state insurance legislation demonstrates that the states have no uniform policy

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[80] The Court, of course, cannot pass upon the status of the various laws or the rates established under them on the record in this case.

[81] Of the six states involved in this litigation three (Alabama, Florida, Georgia) have no statutes authorizing rating bureaus. Virginia requires membership in a rating bureau but provides that no rates shall become operative until approved by the state commissioner. South Carolina permits membership in rating bureaus, but the state commissioner may disapprove any rate agreement and may also order changes in rates. Only in North Carolina is there any implied authorization for the operation of rating bureaus without ultimate power in the state commissioner to supervise the rate structure. The Florida Supreme Court has held that the rating-bureau system does not violate the antitrust law of that state. *Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934). The Georgia Supreme Court has held that the by-laws of the Atlanta Association of Fire Insurance Agents, which required members to engage in substantially the same activities as are alleged in the present indictment, violate the laws of Georgia. *Atlanta Association of Fire Insurance Agents* v. *McDonald*, 181 Ga. 105 (1935).

[82] Both North Carolina and South Carolina have statutes forbidding coercive tactics. See note 98, *infra*.

concerning the regulation or control of fire insurance rates, and that no such destruction of the regulatory systems established by the states as has been suggested by appellees is to be feared. The states can, as many of them have, regulate the fire insurance industry in a manner entirely compatible with the Sherman Act. In these circumstances, the effect of the Act upon state legislation is certainly not sufficient to warrant a restrictive interpretation contrary to its language and purposes.

It should be noted that the arguments advanced by appellees as to why competition is undesirable, and the state statutes upon which they rely, are concerned only with competition in the fixing of rates. None purport to justify or protect the coercive tactics with which appellees are charged. The proponents of a non-competitive rating system have not gone so far as to suggest that the insurance companies should not only be allowed to agree upon rates among themselves but to coerce all other agents and companies to join with them. No one, so far as we know, has advocated that such boycotts as are alleged in this case, directed at uncooperative companies, and agents and purchasers who deal with them, should be any more legitimate in the insurance industry than any other. The Report of the Joint Committee of the Senate and Assembly of the State of New York (Merritt Report, 1911) upon which appellees have relied, states that although the companies should be permitted to maintain proper rate making associations, "they must not seek to strengthen their

own agreement by forcing third persons to help them do so" (p. 125). And the laws of several of the states which permit rating bureaus to operate expressly proscribe conduct of this sort.[53]

Acceptance of appellees' arguments that insurance should be wholly exempt from the Sherman Act would allow them to continue to coerce any companies which sought to compete with them on a rate basis and to boycott any agents and customers who had the temerity to deal with such competitors.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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[53] 27 McKinney's Cons. L. Ann. (N. Y., 1940), § 181 (7); N. C. Code (Michie, 1939), § 6432; N. D. Comp. L. (Supp. 1913–1925), § 4964a1; Ore. Comp. L. Ann. (1940), § 101–142; Code S. C. (1942), § 8018; Vt. Pub. L. (1933), § 7124.

APPENDIX

APPELLEE FIRE INSURANCE COMPANIES

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
Aetna Insurance Company	Connecticut	$27,473,940	$575,000	2.10	*$26,898,940	97.90	$2,735,000	9.95
Agricultural Insurance Company	New York	8,185,449	2,213,000	27.04	*5,972,449	72.96	562,000	6.87
Albany Insurance Company	New York	1,329,248	230,000	17.30	1,099,248	82.70	147,000	11.06
The Allemannia Fire Insurance Company of Pittsburgh	Pennsylvania	1,557,245	289,000	18.59	*1,268,245	81.44	140,000	8.99
The Alliance Insurance Company	Pennsylvania	3,857,778	593,000	15.37	*3,264,778	84.63	216,000	6.60
American Alliance Insurance Company	New York	2,769,891	560,000	20.22	*2,209,891	79.78	287,000	10.36
American and Foreign Insurance Company	New York	2,542,234	1,212,000	47.67	1,330,234	52.33	131,000	5.15
American Central Insurance Company	Missouri	3,620,344	204,000	5.63	*3,416,344	94.37	226,000	6.24
American Eagle Fire Insurance Company	New York	5,496,775	1,264,000	23.00	4,232,775	77.00	571,000	10.39
American Equitable Assurance Company of New York	New York	6,220,538	1,538,000	24.72	*4,682,538	75.28	351,000	5.64
American Fire Insurance Company	Texas	262,636	6,000	2.28	256,636	97.72	9,000	3.43
American Home Fire Assurance Company	New York	1,374,720	116,000	8.44	*1,258,720	91.56	186,000	13.53
American Indemnity Company	Texas	3,216,852	758,000	23.56	2,458,852	76.44	312,000	9.70
The American Insurance Company	New Jersey	15,053,506	1,306,000	8.68	*13,747,506	91.32	1,480,000	9.83
American Union Insurance Company of New York	New York	1,102,513	181,000	16.42	921,513	83.58	72,000	6.53
Anchor Insurance Company	Rhode Island	626,319	7,000	1.12	*619,319	98.88	57,000	9.10
Atlas Assurance Company, Ltd	England	4,712,478			*4,712,478	100.00	431,000	9.15
The Automobile Insurance Company of Hartford Connecticut.	Connecticut	18,188,546	593,000	3.26	*17,595,546	96.74	1,350,000	7.42
The Baltimore American Insurance Company of New York	New York	2,625,341	267,000	10.17	*2,358,341	89.83	262,000	9.98

*Includes some direct writings in foreign countries.

Bankers & Shippers Insurance Company of New York	New York	4,813,747	677,000	14.06	*4,136,747	85.94	443,000	9.20
Birmingham Fire Insurance Company of Pennsylvania	Pennsylvania	1,010,181	135,000	13.36	*875,181	86.64	134,000	13.26
Boston Insurance Company	Massachusetts	7,054,148	1,389,000	19.69	*5,665,148	80.31	498,000	7.06
British America Assurance Company	Canada	309,536	1,000	3.26	*308,536	99.68	42,000	13.57
British General Insurance Company, Ltd	England	445,950			445,950	100.00	100,000	22.42
Caledonian-American Insurance Company	New York	600,987	44,000	7.32	*556,987	92.68	12,000	2.00
Caledonian Insurance Company	Scotland	2,682,409			2,682,409	100.00	211,000	7.87
The California Insurance Company	California	2,353,427	412,000	17.51	*1,941,427	82.49	321,000	13.64
Camden Fire Insurance Association	New Jersey	6,440,928	797,000	12.37	*5,643,928	87.63	518,000	8.04
Capital Fire Insurance Company of California	California	861,752	114,000	13.23	747,752	86.77	50,000	5.80
The Carolina Insurance Company	North Carolina	1,749,392	932,000	53.28	817,392	46.72	1,001,000	57.22
Central Insurance Company of Baltimore	Maryland	2,527,774	758,000	29.99	1,769,774	70.01	235,000	9.30
Central Union Insurance Company	New Jersey	482,222	34,000	7.05	*448,222	92.95	10,000	2.07
Century Insurance Company, Ltd	England	1,197,623			1,197,623	100.00	77,000	6.43
The Charter Oak Fire Insurance Company	Connecticut	936,407	43,000	4.59	893,407	95.41	53,000	5.66
Citizens Insurance Company of New Jersey	New Jersey	3,729,108	40,000	1.07	*3,689,108	98.93	754,000	20.22
City of New York Insurance Company	New York	2,873,195	459,000	15.98	*2,414,195	84.02	215,000	7.48
The Columbia Fire Insurance Company	Ohio	1,596,156	160,000	10.02	1,436,156	89.98	268,000	16.79
Columbia Insurance Company of New York	New York	1,451,315	193,000	13.30	*1,258,315	86.70	98,000	6.75
Commerce Insurance Company	New York	1,568,018	431,000	27.49	1,137,018	72.51	210,000	13.39
Commercial Union Assurance Company, Ltd	England	5,791,698			*5,791,698	100.00	500,000	8.63
Commercial Union Fire Insurance Company of New York	New York	1,971,765	169,000	8.57	*1,802,765	91.43	312,000	15.82
The Commonwealth Insurance Company of New York	New York	2,657,615	416,000	15.65	*2,241,615	84.35	141,000	5.31
The Concordia Fire Insurance Company of Milwaukee	Wisconsin	2,453,054	228,000	9.29	2,225,054	90.71	205,000	8.36
The Connecticut Fire Insurance Company	Connecticut	6,549,189	158,000	2.41	*6,391,189	97.59	203,000	3.10
Continental Insurance Company	New York	30,272,000	7,840,000	25.90	*22,432,000	74.10	1,409,000	4.65
County Fire Insurance Company	Pennsylvania	738,886	107,000	14.48	631,886	85.52	105,000	14.21
Detroit Fire and Marine Insurance Company	Michigan	1,526,159	495,000	32.43	*1,031,159	67.57	228,000	14.94
Dixie Fire Insurance Company	North Carolina	1,882,486	344,000	18.27	1,538,486	81.73	636,000	33.79
The Eagle Fire Company of New York	New York	904,263	87,000	9.62	*817,263	90.38	102,000	11.28
Eagle Star Insurance Company, Ltd	England	4,539,183			4,539,183	100.00	177,000	3.90
East & West Insurance Company of New Haven	Connecticut	646,581	65,000	10.05	581,581	89.95	45,000	6.96
Empire State Insurance Company	New York	1,446,401	360,000	24.89	1,086,401	75.11	237,000	16.39

*Includes some direct writings in foreign countries.

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia—Continued

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
The Employers' Fire Insurance Company	Massachusetts	$4,881,490	$573,000	11.74	*$4,308,490	88.26	$208,000	4.26
Equitable Fire and Marine Insurance Company	Rhode Island	2,238,407	68,000	3.04	*2,170,406	96.96	181,000	8.09
Equitable Fire Insurance Company	South Carolina	201,254	253,010	86.87	38,244	13.13	201,254	100.00
Export Insurance Company	New York	1,190,751	397,000	33.34	793,751	66.66	159,000	13.35
Federal Insurance Company	New Jersey	17,434,660	329,000	1.89	*17,105,660	98.11	636,000	3.65
Federal Union Insurance Company	Illinois	1,418,909	117,000	8.25	1,301,909	91.75	178,000	12.54
Fidelity & Guaranty Fire Corp	Maryland	7,334,000	357,000	4.87	*6,977,000	95.13	554,000	7.55
Fidelity-Phoenix Fire Insurance Company	New York	16,812,527	2,387,000	14.20	*14,425,527	85.80	984,000	5.85
Fire Association of Philadelphia	Pennsylvania	13,667,122	1,773,000	12.97	*11,894,122	87.03	944,000	6.91
Fireman's Fund Insurance Company	California	25,382,122	6,715,000	26.46	*18,667,122	73.54	1,491,000	5.65
Firemen's Insurance Company	New Jersey	16,331,059	1,665,000	10.20	*14,666,059	89.80	562,000	3.44
First American Fire Insurance Company	New York	2,723,487	381,000	13.99	*2,342,487	86.01	268,000	9.84
Franklin Fire Insurance Company	Pennsylvania	8,963,212	1,812,000	20.22	7,151,212	79.78	632,000	7.05
Franklin National Insurance Company of New York	New York	1,912,600	292,000	15.27	*1,620,600	84.73	141,000	7.37
The Fulton Fire Insurance Company	New York	1,217,957	119,000	9.77	1,098,957	90.23	227,000	18.64
Georgia Home Insurance Company	Georgia	862,760	158,000	18.31	704,760	81.69	228,000	26.43
The Gibraltar Fire and Marine Insurance Company	New York	2,217,280	101,000	4.56	2,116,280	95.44	842,000	37.97
Girard Fire and Marine Insurance Company	Pennsylvania	2,876,555	251,000	8.73	*2,625,555	91.27	245,000	8.52
Glens Falls Insurance Company	New York	12,155,005	4,803,000	39.51	*7,352,005	60.49	801,000	6.59
Globe & Republic Insurance Company of America	Pennsylvania	2,260,967	360,000	15.92	*1,900,967	84.08	79,000	3.49
Globe and Rutgers Fire Insurance Company	New York	3,161,644	856,000	27.07	*2,305,644	72.93	324,000	10.25
Granite State Fire Insurance Company	New Hampshire	1,920,280	286,000	14.89	*1,634,280	85.11	144,000	7.50
Great American Insurance Company	New York	13,355,195	2,546,000	19.06	*10,809,195	80.94	964,000	7.22
The Halifax Insurance Company	Canada	597,095			597,095	100.00	13,000	2.18

*Includes some direct writings in foreign countries.

Hanover Fire Insurance Company	New York	8,217,457	1,176,000	14.31	*7,041,457	85.69	480,000	5.84
Hartford Fire Insurance Company	Connecticut	37,184,966	559,000	1.50	*36,625,966	98.50	3,379,000	9.09
Home Fire and Marine Insurance Company	California	3,433,086	577,000	16.81	*2,856,086	83.19	282,000	8.21
The Home Insurance Company	New York	43,886,758	8,766,000	19.97	*35,120,758	80.03	3,159,000	7.20
The Homeland Insurance Company of America	New York	2,019,299	203,000	10.05	1,816,299	89.95	222,000	10.99
The Homestead Fire Insurance Company	Maryland	1,902,941	306,000	16.08	*1,596,941	83.92	359,000	18.87
Imperial Assurance Company	New York	1,275,318	104,000	8.15	*1,171,318	91.85	77,000	6.04
Insurance Company of North America	Pennsylvania	32,450,471	4,242,000	13.07	*28,208,471	86.93	1,409,000	4.34
The Insurance Company of the State of Pennsylvania	Pennsylvania	2,779,227	281,000	10.11	2,498,227	89.89	302,000	10.87
Jersey Insurance Company of New York	New York	2,474,783	378,000	15.27	*2,096,783	84.73	205,000	8.28
Knickerbocker Insurance Company of New York	New York	1,859,122	374,000	20.12	*1,485,122	79.88	120,000	6.45
Lafayette Fire Insurance Company	Louisiana	†189,715	110,000	57.98	79,715	42.02	None	----------
Law Union and Rock Insurance Company, Ltd	London	797,502	----------	----------	797,502	100.00	60,000	7.52
The Liverpool and London and Globe Insurance Co., Ltd	England	9,563,722	----------	----------	*9,563,722	100.00	788,000	8.24
The London and Lancashire Insurance Company, Ltd	England	3,402,827	----------	----------	3,402,827	100.00	281,000	8.26
London and Provincial Marine and General Insurance Co., Ltd.	England	273,858	----------	----------	273,858	100.00	2,000	.73
London and Scottish Assurance Corporation, Ltd	Unknown	616,020	----------	----------	616,020	100.00	93,000	15.10
The London Assurance	England	3,614,083	----------	----------	3,614,083	100.00	240,000	6.64
Lumbermen's Insurance Company	Pennsylvania	1,362,737	284,000	20.84	*1,078,737	79.16	85,000	6.24
The Manhattan Fire and Marine Insurance Company	New York	1,589,518	214,000	13.46	1,375,518	86.54	106,000	6.67
Marine Insurance Company, Limited	England	1,543,320	----------	----------	1,543,320	100.00	15,000	.97
Maryland Insurance Company	Delaware	1,177,145	----------	----------	*1,177,145	100.00	80,000	6.80
Massachusetts Fire and Marine Insurance Company	Massachusetts	1,241,323	105,000	8.46	1,136,323	91.54	135,000	10.88
Mechanics and Traders Insurance Company	Connecticut	1,464,662	31,000	2.12	1,433,662	97.88	208,000	14.20
The Mercantile Insurance Company of America	New York	2,571,838	554,000	21.54	2,017,838	78.46	141,000	5.47
Merchants and Manufacturers Insurance Company of New York	New York	1,505,155	221,000	14.68	*1,284,155	85.32	70,000	4.65
Mercury Insurance Company	Minnesota	1,993,519	114,000	5.72	*1,879,519	94.28	114,000	5.72
Michigan Fire and Marine Insurance Company	Michigan	2,489,540	693,000	27.84	*1,796,540	72.16	134,000	5.38
Milwaukee Mechanics' Insurance Company	Wisconsin	5,400,238	233,000	4.31	*5,167,238	95.69	271,000	5.02
Minneapolis Fire and Marine Insurance Company	Minnesota	1,209,640	181,000	14.96	1,028,640	85.04	80,000	6.61
National-Ben Franklin Fire Insurance Company	Pennsylvania	2,701,412	484,000	17.91	*2,217,412	82.08	167,000	6.18

*Includes some direct writings in foreign countries.

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia—Continued

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
National Fire Insurance Company of Hartford	Connecticut	$19,103,475	$745,000	3.90	*$18,358,475	96.10	$1,221,000	6.39
National Liberty Insurance Company of America	New York	9,068,523	1,663,000	18.58	*7,375,523	81.42	596,000	6.58
National Security Insurance Company	Nebraska	1,562,767	182,000	11.65	*1,380,767	88.35	144,000	9.21
National Union Fire Insurance Company	Pennsylvania	12,046,831	1,905,000	15.81	*10,141,831	84.19	1,325,000	11.00
Netherlands Insurance Company, Est. 1845	Unknown	432,724			432,724	100.00	21,000	4.85
Newark Fire Insurance Company	New Jersey	3,162,155	411,000	13.00	*2,751,155	87.00	82,000	2.59
The New Brunswick Fire Insurance Company	New Jersey	2,490,689	236,000	9.48	*2,254,689	90.52	539,000	21.64
New England Fire Insurance Company	Massachusetts	1,876,866	93,000	4.96	*1,783,866	95.04	164,000	8.74
New Hampshire Fire Insurance Company	New Hampshire	5,957,058	522,000	8.76	*5,435,058	91.24	467,000	7.84
New York Fire Insurance Company	New York	2,737,739	500,000	18.26	*2,237,739	81.74	181,000	6.61
New York Underwriters Insurance Company	New York	6,021,609	606,000	10.06	*5,415,609	89.94	686,000	11.39
Niagara Fire Insurance Company	New York	7,059,026	1,174,000	16.63	*5,885,026	83.37	348,000	4.93
North British and Mercantile Insurance Company, Ltd	England	7,114,844			*7,114,844	100.00	515,000	7.24
The North Carolina Home Insurance Company	North Carolina	357,082	271,382	76.00	85,700	24.00	271,382	76.00
The Northern Assurance Company, Limited	England	4,437,575			4,437,575	100.00	434,000	9.78
Northern Insurance Company of New York	New York	6,253,604	1,312,000	20.98	4,941,604	79.02	181,000	2.89
The North River Insurance Company	New York	6,999,324	1,116,000	15.94	5,883,324	84.06	573,000	8.19
Northwestern Fire and Marine Insurance Company	Minnesota	2,646,127	318,000	12.02	2,328,127	87.98	343,000	12.96
Northwestern National Insurance Company	Wisconsin	6,033,141	467,000	7.74	5,566,141	92.26	102,000	1.69
Norwich Union Fire Insurance Society, Ltd	England	2,796,774			2,796,774	100.00	253,000	9.05
Occidental Insurance Company	California	1,737,607	190,000	10.93	1,547,607	89.07	156,000	8.98
Old Colony Insurance Company	Massachusetts	1,958,418	320,000	16.34	*1,638,418	83.66	292,000	14.91
Orient Insurance Company	Connecticut	2,679,625	92,000	3.43	2,587,625	96.57	206,000	7.69
The Pacific Coast Fire Insurance Company	Canada	333,295			333,295	100.00	28,000	8.40

*Includes some direct writings in foreign countries.

Pacific Fire Insurance Company	New York	5,978,855	838,000	14.02	*5,140,855	85.98	521,000	8.71
Pacific National Fire Insurance Company	California	6,098,649	1,535,000	25.17	4,563,649	74.83	269,000	4.41
Palatine Insurance Company, Ltd	England	995,779			995,779	100.00	278,000	27.92
Paramount Fire Insurance Company	New York	793,260	35,000	4.41	758,260	95.59	102,000	12.86
Patriotic Insurance Company	New York	1,196,336	252,000	21.06	944,336	78.94	132,000	11.03
The Paul Revere Fire Insurance Company	New York	1,681,737	302,000	17.96	1,379,737	82.04	100,000	5.95
The Pennsylvania Fire Insurance Company	Pennsylvania	6,426,093	1,090,000	16.96	*5,336,093	83.04	381,000	5.93
Philadelphia Fire and Marine Insurance Company	Pennsylvania	3,083,660	500,000	16.21	*2,583,660	83.79	289,000	9.37
Philadelphia National Insurance Company	Pennsylvania	452,045	40,000	8.85	412,045	91.15	47,000	10.40
Phoenix Assurance Company, Limited, of London	England	4,346,335			4,346,335	100.00	311,000	7.16
The Phoenix Insurance Company	Connecticut	9,794,209	272,000	2.78	*9,522,209	97.22	559,000	5.71
Piedmont Fire Insurance Company	North Carolina	2,011,601	411,000	20.43	1,600,601	79.57	654,000	32.51
The Potomac Insurance Company of the District of Columbia	District of Columbia	3,052,209	37,000	1.21	*3,015,209	98.79	102,000	3.34
Providence Washington Insurance Company	Rhode Island	8,723,757	476,000	5.46	*8,247,757	94.54	791,000	9.07
Provident Fire Insurance Company	New Hampshire	1,362,681	83,000	6.09	1,279,681	93.91	135,000	9.91
Queen Insurance Company of America	New York	9,457,436	1,825,000	19.30	*7,632,436	80.70	537,000	5.68
The Reliance Insurance Company of Philadelphia	Pennsylvania	1,482,537	108,000	7.28	1,374,537	92.72	227,000	15.31
Richmond Insurance Company of N. Y.	New York	1,158,564	229,000	19.77	*929,564	80.23	124,000	10.70
Rochester American Insurance Company	New York	1,700,860	205,000	12.05	1,495,860	87.95	287,000	16.87
Royal Exchange Assurance	England	3,292,167			3,292,167	100.00	176,000	5.35
Royal Insurance Company, Limited	England	10,576,365			*10,576,365	100.00	852,000	8.06
Safeguard Insurance Company	New York	838,047	84,000	10.02	754,047	89.98	91,000	10.86
St. Paul Fire and Marine Insurance Company	Minnesota	19,534,080	988,000	5.06	*18,546,080	94.94	913,000	4.67
Scottish Union and National Insurance Company	Unknown	2,870,809			2,870,809	100.00	160,000	5.57
Seaboard Fire and Marine Insurance Company of New York, N. Y.	New York	1,859,078	222,000	11.94	*1,637,078	88.06	79,000	4.25
Seaboard Insurance Company	Maryland	438,128	124,000	28.30	314,128	71.70	33,000	7.53
The Sea Insurance Company, Limited	England	3,347,707			3,347,707	100.00	21,000	.63
Security Insurance Company of New Haven	Connecticut	5,850,471	386,000	6.60	*5,464,471	93.40	330,000	5.64
Sentinel Fire Insurance Company	Massachusetts	1,913,434	132,000	6.90	*1,781,434	93.10	388,000	20.27
Southern Fire Insurance Company	North Carolina	955,759	408,000	42.69	*547,759	57.31	524,000	54.83
Springfield Fire and Marine Insurance Company	Massachusetts	12,295,083	795,000	6.47	*11,500,083	93.53	801,000	6.51

*Includes some direct writings in foreign countries.

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia—Continued

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
The Standard Fire Insurance Company	Connecticut	$3,272,974	$177,000	5.41	$3,095,974	94.59	$285,000	8.71
The Standard Fire Insurance Company of New Jersey	New Jersey	1,276,620	277,000	21.70	999,620	78.30	36,000	2.82
Standard Insurance Company of New York	New York	4,491,452	797,000	17.74	*3,694,452	82.26	291,000	6.48
Star Insurance Company of America	New York	2,092,118	394,000	18.83	1,698,118	81.17	165,000	7.89
Sun Insurance Office, Ltd	England	5,281,737			5,281,737	100.00	531,000	10.05
Sun Underwriters Insurance Company	New York	679,561	106,000	15.60	573,561	84.40	132,000	19.42
Transcontinental Insurance Company	New York	1,892,496	448,000	23.67	*1,444,496	76.33	127,000	6.71
The Travelers Fire Insurance Company	Connecticut	17,839,028	672,000	3.78	*17,167,028	96.22	1,245,000	6.98
Twin City Fire Insurance Company	Minnesota	1,258,306	113,000	8.98	1,145,306	91.02	120,000	9.54
Union Assurance Society, Limited	England	724,617			724,617	100.00	90,000	12.42
Union Insurance Society of Canton, Limited	Hong Kong	850,935			850,935	100.00	3,000	.35
The Union Marine & General Insurance Company, Limited	England	1,420,867			1,420,867	100.00	45,000	3.17
United Firemen's Insurance Company of Philadelphia	Pennsylvania	1,937,987	121,000	6.24	*1,816,987	93.76	170,000	8.77
United States Fire Insurance Company	New York	14,656,058	3,237,000	22.09	*11,419,058	77.91	914,000	6.24
Vigilant Insurance Company	New York	344,857	164,000	66.98	80,857	33.02	24,000	9.80
Virginia Fire and Marine Insurance	Virginia	674,958	231,000	34.22	443,958	65.78	370,000	54.81
Westchester Fire Insurance Company	New York	11,513,729	3,615,000	31.40	*7,898,729	68.60	589,000	5.12
Western Assurance Company	Canada	1,255,236			1,255,236	100.00	291,000	23.18
Western Fire Insurance Company	Kansas	917,612	85,000	9.26	832,612	90.74	none	

*Includes some direct writings in foreign countries.

The World Fire and Marine Insurance Company	Connecticut	3, 889, 046	175, 000	4. 50	*3, 714, 046	95. 50	732, 000	18. 82
Yorkshire Insurance Company, Limited	England	2, 492, 555			2, 492, 555	100. 00	185, 000	7. 42
Totals		$866, 764, 876	$109, 721, 392	12. 37	$777, 043, 484	87. 63	$66, 982, 636	7. 78

Source: Best's Insurance Reports, Fire and Marine Edition, 1942.

*Includes some direct writings in foreign countries.

†The direct writings of this company as shown by *Best's Insurance Reports, Fire and Marine Edition, 1942*, are the income for the year 1940.

NOTE: The distribution of direct writings by states is not available for thirteen appellee companies. No information is published in *Best's Insurance Reports* with reference to the detail of operations of the Catawba Insurance Company, South Carolina. The net premiums written during 1941 are as follows for twelve appellee companies:

Company	State of Incorporation	Net Premiums Written
Atlantic Fire Insurance Company	North Carolina	.....
Bankers Fire and Marine Insurance Company	Alabama	$55, 152
Birmingham Fire Insurance Company	Alabama	794, 367
Eastern Shore of Virginia Fire Insurance Company, Inc	Virginia	56, 201
Old Dominion Fire Insurance Company	Virginia	34, 404
Rhode Island Insurance Company	Rhode Island	2, 798, 325
South Carolina Insurance Company	South Carolina	779, 703
Southeastern Fire Insurance Company	South Carolina	.....
Southern Fire and Marine Insurance Company of Georgia	Georgia	27, 876
Standard Marine Insurance Company, Limited	England	2, 188. 678
The State Assurance Company, Limited	England	709. 613
Stonewall Insurance Company	Alabama	57, 864
Total		$7, 891, 183

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